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In The

Supreme Court of the United States

October Term, 1987

CNA FINANCIAL CORPORATION, CONTINENTAL ASSURANCE COMPANY, and CONTINENTAL CASUALTY COMPANY,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and DIRECTOR OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The instant case is what was described in *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979), as a reverse-Freedom of Information Act case. At issue is the public disclosure by a federal agency of confidential, commercial data, which petitioners contend are exempt from disclosure under the FOIA, 5 U.S.C. § 552, and protected from disclosure by the Trade Secrets Act, 18 U.S.C. § 1905. The decision to disclose was based on a report, commissioned by the respondent agency, from a professor outside the government, which was neither placed in the record nor otherwise revealed to petitioners. The specific issues in the instant case, two of which were expressly left open in *Chrysler* (441 U.S. at 318-19 & n. 49), are:

1. When, if ever, is a private business entitled to *de novo* review of a factual determination by an agency that results in the release of its confidential, commercial data under the Freedom of Information Act, 5 U.S.C. § 552?

2. What is the scope of the Trade Secrets Act, 18 U.S.C. § 1905, and its relationship to Exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3) and (b)(4)?

Assuming, *arguendo*, the absence of *de novo* judicial review:

3. When, if ever, is a private business entitled to receive from a federal agency adjudicating the disposition of property rights, notice of the issues, an indication of the evidence upon which the agency relies, and/or an opportunity to respond to the factual issues?

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Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and DIRECTOR OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE UNITED STATES DEPARTMENT OF LABOR,
Respondents.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, CNA Financial Corporation, Continental Assurance Company, and Continental Casualty Company

[1] Pursuant to Rule 21.1(b), petitioners state that Plaintiffs-Appellants in the Court of Appeals were CNA Financial Corporation, Continental Assurance Company, and Continental Casualty Company. Defendants-Appellees were Raymond J. Donovan, Secretary of the United States Department of Labor, and Ellen M. Shong, Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor.

(collectively "CNA"),[2] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 29, 1987.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1-68) is officially reported as *CNA Financial Corporation, et al. v. Raymond J. Donovan, et al.*, 830 F.2d 1132 (D.C. Cir. 1987). The opinion is unofficially reported at 44 Empl. Prac. Dec. (CCH) ¶ 37,424. The October 29, 1981, opinion of the district court (App. A, pp. 130-41) is not officially reported. The opinion portion of the November 28, 1980, opinion and order of the Office of Federal Contract Compliance Programs (App. A, pp. 72-94) is unofficially reported at 24 FEP Cases 877, *sub nom. In re CNA Financial Corp.*. The July 17, 1981, Supplemental Decision of the Office of Federal Contract Compliance Programs (*In re CNA Financial Corp.*) (App. A, pp. 124-29) is not officially reported.

JURISDICTION

The judgment of the court of appeals for the District of Columbia Circuit was entered on September 29, 1987. App. A, p. 143. CNA's timely petition for rehearing was denied on December 1, 1987. App. A, p. 144. CNA's suggestion for rehearing *en banc* was denied on December 2, 1987. App. A, p. 145. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[2] Pursuant to Rule 28.1, petitioners submit the following list of their parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates: Bulova Watch Company, Inc.; Loews Corporation; and Lorillard, Inc.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, provides, in relevant part:

> § 552. Public information; agency rules, opinions, orders, records, and proceedings
>
> * * *
>
> (b) This section does not apply to matters that are–
>
> * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . .

18 U.S.C. § 1905, sometimes referred to as the Trade Secrets Act, provides:

> § 1905. Disclosure of confidential information generally
>
> Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of

> any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without compensation.

STATEMENT OF THE CASE

This is a reverse-Freedom of Information Act case. The lengthy procedural history is set forth in detail in the court of appeals' opinion. 830 F.2d at 1134-37, 1156-59; App. A, pp. 3-9, 53-59. The facts can be summarized as follows.

Pursuant to Executive Order 11246, CNA was required to submit to the government various materials regarding its workforce as well as its plans for the future. In response to a Freedom of Information Act ("FOIA") request from Women Employed for public disclosure of those materials, CNA submitted to the Office of Federal Contract Compliance Programs (OFCCP)[3] detailed objections, including numerous expert affidavits and depositions which, CNA contended, established that the disputed data were confidential, commercial data, which if released, would cause substantial competitive harm.[4] The

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[3] OFCCP had assumed the enforcement responsibilities previously exercised by the Social Security Administration's Insurance Compliance Staff, the original agency to which the request was directed.

[4] CNA's evidence demonstrated, *inter alia*, that disclosing its data would (1) permit competitors to determine the markets and areas of the country CNA was contemplating entering, and, thus,

(Footnote continued on the following page)

OFCCP twice denied CNA's requests for an opportunity to confront the evidence against it, if any, and failed to provide CNA with notice of the bases on which the OFCCP proposed to act, and the issues it would be considering. Nor was CNA told during the administrative proceedings that the agency was relying on evidence outside the record – the report of a purported outside expert whose qualifications were never specified, and who had been engaged by the agency to determine the existence of the competitive threat CNA asserted. After CNA learned of the preparation of the report during the interim judicial proceedings, the agency refused to produce it, leaving an administrative record consisting only of the evidence submitted by CNA. Notwithstanding the absence of any controverting evidence in the record, the OFCCP decided to release the disputed data because it concluded that disclosure would not cause substantial competitive harm as defined by the District of Columbia Circuit in *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) ("*National Parks I*").

CNA had objected to the use of the *National Parks I* test, contending instead that the full scope of the Trade Secrets Act governed. CNA further contended that, even under the *National Parks* test, disclosure would inflict substantial competitive harm. Without any record evidence to the contrary, the agency "forecast[ed]" (830 F.2d at 1155; App. A., p. 51) the impact of disclosure on cost, marketing, and recruiting advantages in the insurance industry that CNA's competitors might obtain, employee raiding, and employee morale and productivity.

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4 *(Continued)*
minimize their own costs, (2) aid competitors in directing their recruiting efforts to the same sources utilized by CNA, (3) facilitate significant raiding of its key corporate personnel, and (4) adversely affect employee morale.

On October 29, 1981, the district court granted summary judgment in favor of the agency after finding that the OFCCP properly withheld the extra-record report it had utilized, that the OFCCP was not required to hold an evidentiary hearing and that *de novo* judicial review was not required.

On September 29, 1987, nearly six years after oral argument, the court of appeals affirmed. The court of appeals held that the Trade Secrets Act is not an exempting statute under Exemption 3 of the FOIA. 830 F.2d at 1137-43; App. A, pp. 10-24. While holding that the scope of the Trade Secrets Act "is at least co-extensive with that of Exemption 4 of FOIA . . . " (830 F.2d at 1151; App. A, p. 42), the court found that the OFCCP was correct in applying the *National Parks I* substantial competitive harm test. 830 F.2d at 1152-53; App. A, pp. 43-46. Regarding the report of the outside expert engaged by the OFCCP, the court concluded that, because the OFCCP had "encounter[ed] problems outside [its] ken," it was permissible to "enlist the help of outside experts skilled at unravelling their knotty complexities" (830 F.2d at 1162; App. A, p. 66) without permitting CNA either access to the report or an opportunity to rebut the testimony thereby elicited. Applying an "arbitrary, capricious or abuse of discretion" standard of review, the court held that the agency's decision as to competitive harm was one of the "judgments and forecasts courts traditionally leave largely to agency expertise. . . ." 830 F.2d at 1155; App. A, p. 51.

The court rejected CNA's procedural due process argument by referring to one of the opinions in a *per curiam* decision, *National Organization for Women v. Social Security Administration*, 736 F.2d 727 (D.C. Cir. 1984) ("*NOW*"), in which it was noted that the OFCCP review was "sufficient to allay concerns about fairness to the submitters of information." 830 F.2d at 1159; App. A, pp. 59-60. Finally, the court sustained the refusal to provide *de*

novo review, based on its reading of *Camp v. Pitts*, 411 U.S. 138 (1973), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), together with the opinion in *NOW*. 830 F.2d at 1162; App. A, pp. 66-67.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Involves Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

The resolution of the instant case has been long awaited by the courts, government and business. *See* p. 8, *infra*. This case presents the significant reverse-FOIA issues reserved in *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979): (1) whether a submitter is entitled to *de novo* review of agency action in the district court when material factual disputes exist as to the protected nature of confidential, commercial data, (2) the "relative ambits" of FOIA Exemption 4 and the Trade Secrets Act, and (3) whether the Trade Secrets Act is an exempting statute under FOIA Exemption 3. 441 U.S. at 318-19 & n. 49. As the court of appeals recognized, this case presents "important" and "difficult questions . . . never squarely decided" prior to this action. 830 F.2d at 1133-34; App. A, pp. 2-3. Indeed, "[p]erhaps the most significant effect of *Chrysler*," as one commentator has noted, "was that it did not answer many of the questions that needed to be addressed." [5] The resultant "uncertainty . . . and the lack of guidance" [6] has created enormous practical difficulties. As the Justice Department

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[5] *The Freedom Of Information Reform Act: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. 287 (1984) (statement of Burt Braverman, Cole, Raywid & Braverman, Washington, D.C.).

[6] Stevenson, *Protecting Business Secrets Under The Freedom of Information Act: Managing Exemption 4*, 34 Admin. L.Rev. 207, 247 (1982).

noted shortly after *Chrysler*, that decision "leaves several crucial issues undecided, making it impossible to provide a comprehensive and certain statement of what [is] the law" involved.[7]

1. *This is the leading reverse-Freedom Of Information Act case now before the courts.* Over six years ago the instant case was argued orally before the court of appeals below. Since that time the government, the district courts across the nation, and businesses submitting data to the government have waited for the "outcome on review" [8] of the instant case. Numerous reverse-FOIA cases were held in abeyance pending resolution of this case.[9] Two years ago, the government voiced its concern that this case, "involv[ing] issues of significance [was] still pending after all these years." [10] This case, therefore, is the appropriate opportunity for resolution of the unanswered questions of *Chrysler* and the substantial uncertainty they have caused.[11]

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[7] U.S. Department of Justice, Office of Information, Law and Policy, 1 FOIA Update 3 (Winter, 1980).

[8] J. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW 10-26 (1985).

[9] See the Joint Status Reports in *Sears, Roebuck and Co. v. Eckerd, et al.*, No. 76 C 2444 (N.D. Ill.) (App. C, pp. 1-4); *Westinghouse Electric Corp. v. Brown*, No. 77-0613-LEW (C.D. Cal.); and *Westinghouse Electric Corp. v. Brown*, No. 78-3799-LEW (C.D. Cal.) (App. C, pp. 5-12). Petitioners are also advised that *Texaco v. Marshall*, C.A. No. 77-0875 (D.D.C.) and *Texaco v. Andress*, C.A. No. 78-0926 (D.D.C.) are being held in abeyance at the agency level pending a decision in the instant case. Additionally, the Department of Labor reports that at least a dozen similar cases are currently pending in the district courts. Daily Labor Report (BNA) A-6 (October 2, 1987).

[10] U.S. Dept. of Justice, Office of Information and Privacy, 6 FOIA Update 4 (Fall 1985).

[11] It has been suggested that the current ambiguities in case law

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2. *It is important that this Court resolve the conflict among the courts below.* The availability of *de novo* review of agency decisions in reverse-FOIA cases "has become one of the major debated points in both legislative and litigative arenas." [12] As the Fourth Circuit noted in *General Motors Corp. v. Marshall*, 654 F.2d 294, 298 & n. 13 (4th Cir. 1981), the existing confusion is due to the failure to squarely confront this issue in *Chrysler*.

In *Chrysler*, this Court noted that *de novo* review is "*ordinarily not necessary* to decide whether a contemplated disclosure runs afoul of § 1905" (emphasis added), but also cited 5 U.S.C. § 706(2)(F), which provides for *de novo* review of agency action in some circumstances. 441 U.S. at 318.[13] This has resulted in great

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11 *(Continued)*
under the FOIA "encourage those who use it for their own private economic gain." *Freedom of Information Act Amendments of 1986. Hearing on H.R. 4862 Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 2d Sess. 26 (1986) (statement of Jack Pulley, Chemical Specialities Manufacturers Assoc.). After *Chrysler*, the Administrative Conference of the United States observed that "[s]ubmitters are insecure about the degree of protection their information will receive when it is in the government's possession," and that this situation hinders agency collection of private information "due to reluctance on the part of submitters to trust that the government will not disclose valuable documents." 1 C.F.R. § 305.82-1 (July 15, 1982). Senator Dole has submitted that *Chrysler* caused the FOIA to be "transformed from a mechanism by which citizens could learn about the operations of their Government into an instrument for industrial espionage." 127 Cong. Rec. 10, 714 (1981) (remarks of Sen. Dole).

[12] O'Reilly, *supra* note 8, at 10-32.

[13] *See* Note, *Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 Colum. L. Rev. 109, 122 (1980), which concludes:

The implication of the first dictum seems plain: courts

(Footnote continued on the following page)

uncertainty.[14]

The courts of appeals have expressed inconsistent opinions interpreting the availability of *de novo* review. *General Motors Corp. v. Marshall*, 654 F.2d at 298-99 (4th Cir. 1981), emphasized that the necessity for *de novo* review was a function of the complexity of the factual issues presented. The court concluded that the "ordinarily not necessary" language of *Chrysler* merely referred to cases where "the relevant facts are undisputed, [and the application of the Trade Secrets Act] becomes one of law" only. *Id.* at 298. By contrast, the District of Columbia Circuit in the instant case, faced with complex factual issues involving competition in the insurance business, industrial psychology, and organizational theory denied *de novo* review.[15] Instead, the court of appeals adopted, by reference to the *NOW* major-

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13 *(Continued)*

> reviewing agency decisions to disclose exempt information may sometimes proceed de novo, rather than on the agency record.

[14] One observer has testified that

> [t]he failure of the Court to resolve this controversy was troublesome not only because of the uncertainty which it left in the law governing reverse FOIA actions, but also because of the perception which it fostered among submitters that they would not be afforded an adequate opportunity for judicial review of their confidentiality claims.

Braverman statement, *supra* note 5, at 325. Indeed, the denial of *de novo* review in the instant case has only "increased the uncertainty and procedural problems for submitters." O'Reilly, *supra* note 8, at 10-26.

[15] The District of Columbia Circuit has previously recognized that the significance of commercial data "to an intelligent competitor is a factual issue." *Sears, Roebuck and Co. v. GSA*, 553 F.2d 1378, 1382 (D.C. Cir.), *cert. denied*, 434 U.S. 826 (1977). In the instant case, the record evidence was limited to affidavits and depositions submitted by CNA regarding competition, industrial psychology, and organizational theory, pertaining to the factual issue of likelihood of competitive injury.

ity opinion, a holding that "procedures must be severely defective before a court . . . can substitute *de novo* review for review of the agency's record" in a reverse-FOIA case. 830 F.2d at 1162; App. A, pp. 66-67; *NOW*, 736 F.2d at 745; App. B, p. 41. The creation of a "severely defective" threshold for *de novo* judicial review is novel. The court suggested that the answer to the *Chrysler dictum* is found in *Citizens to Preserve Overton Park*, 401 U.S. at 414-15, and *Camp v. Pitts*, 411 U.S. at 142, which indicate the appropriateness of *de novo* review when agency procedures are "inadequate"; yet the "severely defective" test creates a more stringent standard.

At issue in a reverse-FOIA case is the adjudication of property rights. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984). Accordingly, this new test for judicial review is not consistent with, for example, the Fifth Circuit's decision in *Porter v. Califano*, 592 F.2d 770, 784 (5th Cir. 1979), where the Court, addressing, as in the instant case, a factual determination in an adjudicatory context, approved *de novo* review under *Overton Park* because agency procedures merely "were inadequate." Engrafting a higher "severely defective" standard, as the District of Columbia Circuit did in the instant case, without regard to the factual nature of the issues, creates a conflict among the circuits that should be resolved.

The instant case is a particularly appropriate vehicle to resolve the puzzle created by *Chrysler's* "cryptic dicta." [16] The failure to provide *de novo* review in this case has been described as the result of a "misguided theory" under which "valuable rights essentially adjudicated by [the administrative] process are lost . . . ." [17] The "procedural rights of submitters" hang in the balance.[18]

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[16] Note, *supra* note 13, at 124.

[17] O'Reilly, *supra* note 8, at 10-31 to 10-32.

[18] *Id.*

3. *The instant case presents issues of national importance regarding the confidentiality of private data submitted to the government.* The relationship between the Trade Secrets Act, § 18 U.S.C. § 1905, and Exemption 4 of FOIA, 5 U.S.C.§ 552(b)(4), at issue in the instant case and left open by *Chrysler*, will determine the degree to which the FOIA is "a vehicle for surveillance, at public expense, of the private affairs of commercial enterprises by their adversaries." [19] The existing uncertainty is one of *Chrysler's* "principal difficulties." [20] In *Chrysler*, this Court suggested in *dictum* that the scopes of § 1905 and Exemption 4 are, in effect, the same. 441 U.S. at 319 n. 49.[21] That scope determines what disclosure would not be "in accordance with law" *(id.* at 318) and hence protected from public dissemination pursuant to FOIA.

Originally § 1905 was viewed as creating "a criminal sanction for the release of 'confidential information.' " *Grumman Aircraft Engineering Corporation v. Renegotiation Board*, 425 F.2d 578, 580 n. 5 (D.C. Cir. 1970). Prior

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[19] Remarks of Sen. Dole, *supra* note 11. Senator Dole noted that "businesses have been organized for the sole purpose of making blanket FOIA requests and selling the business information gleaned from the released records." *Id.* In fact, more than three out of five FOIA requests were from the business community. *Id.*

[20] Stevenson, *supra* note 6, at 247.

[21] The Fourth Circuit, both before and after *Chrysler*, has ruled that the scope of § 1905 and Exemption 4 are " 'the same,' " or "co-extensive.' " *Westinghouse Electric Corporation v. Schlesinger*, 542 F.2d 1190, 1204 n.38 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *General Motors Corp.*, 654 F.2d at 297. In the instant case, the court of appeals found that the scope of the Trade Secrets Act "is *at least* co-extensive with that of Exemption 4. . . ." 830 F.2d at 1151; App. A, p. 42 (emphasis added). The Seventh Circuit has held that if a document "is not protected by exemption 4, even more clearly is it not protected by section 1905 either." *General Electric Co. v. United States Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).

to *National Parks I*, it was concluded that all of the data covered by the historic interpretation of § 1905 was also protected from disclosure by Exemption 4. In the instant case, by contrast, the court of appeals concluded that the *National Parks I*, "substantial competitive harm" test was the appropriate standard "summoned by FOIA Exemption 4." 830 F.2d at 1152; App. A at p. 43. This is a different test than that suggested in *Chrysler;* if § 1905 and Exemption 4 have the same breadth, the *National Parks I* criterion cannot be appropriate unless it also modifies the plain language of § 1905, a criminal statute.[22] The continued viability of the *National Parks I* test is, therefore, necessarily intertwined with the question of the "relative ambits" (*Chrysler*, 441 U.S. at 319 n. 49), of § 1905 and Exemption 4, and warrants resolution by this Court.[23]

Another question undecided by *Chrysler* and presented by the instant case, whether § 1905 is an exempting statute under FOIA Exemption 3 (441 U.S. at 319 n. 49), goes hand in hand with the Exemption 4 question, and should now be addressed. Indeed, prior to *National Parks I*, the District of Columbia Circuit refused to consider § 1905 as an exempting statute under Exemption 3 only because, as noted above, the court believed "confidential information" already was protected by Exemption 4. *Grumman Aircraft*

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[22] One writer has noted that it is unlikely that Congress intended § 1905 to penalize the taking of " 'substantial' property and not 'insubstantial property,' " because Congress does not hesitate to state the distinction between property of different values when it intends to create such a distinction. O'Reilly, *supra* note 8, at 10-68 n. 7.

[23] The *National Parks* test has been called a "blow to the protection of confidential business information" (Braverman statement, *supra* note 5, at 286) and has been criticized as contrary to congressional intent. Remarks of Sen. Dole, *supra* note 11, at 10, 715. *See also* Patten & Weinstein, *Disclosure of Business Secrets Under The Freedom of Information Act: Suggested Limitations*, 29 Admin.L.Rev. 193, 195-202 (1977).

Engineering Corp. v. Renegotiation Board, 425 F.2d at 580 n. 5. If *National Parks I* and its application in this case are correct, however, a gap will exist requiring disclosure of confidential business information under FOIA despite the unrestricted language of § 1905 prohibiting release of such data. Conversely, if, as the Fourth Circuit held in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d at 1203, "§ 1905 is a statute qualifying under Exemption 3," that gap is closed. The need to resolve that question is, therefore, an additional reason for granting the present petition.

B. The Administrative Procedures Approved By The Court Below Are Inconsistent With The Decisions Of This Court.

The procedures applied by the OFCCP are of importance to every government contractor and subcontractor, all of whom are subject to the OFCCP. This case required factual determinations as to whether substantial competitive harm was likely to result from the release of CNA's business data.[24] Such confidential business plans constitute valuable property rights. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1002. Hence, absent the safeguard of *de novo* judicial review, the adjudication of those rights without notice of the issues and without access to the agency's evidence presents issues which should be decided.

This Court has made it clear that "where government action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence

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[24] As noted earlier (*see* note 4 and p. 10, *supra*), CNA presented substantial expert evidence in the areas of competition in the insurance business, industrial psychology and organizational theory. As an example, one expert explained that competitors could use the disputed data to extrapolate CNA's labor costs in particular operations and obtain valuable information on CNA's overall business strategies. Affidavit of Dr. Marcus Cook Bogue III, Joint Appendix below, p. 51. Such information would not otherwise be available to CNA's competitors.

used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959).[25] Additionally, "[a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 288 n. 4 (1974). Those precepts are starkly at odds with the process the OFCCP afforded CNA to defend its property rights before the agency decided to release CNA's data. In the instant case, no evidence contradicting CNA's affidavits was adduced on the record, and the agency refused to reveal the report on which it relied. The OFCCP's refusal both to disclose all of the evidence on which it relied and to identify the purported deficiencies in CNA's affidavits and exhibits contravened *Ohio Bell Telephone Company v. Public Utilities Comm'n of Ohio*, 301 U.S. 292, 300 (1937), and *Brock v. Roadway Express, Inc.*, ___U.S.___, 55 U.S.L.W. 4530 (April 22, 1987).[26] Like *Ohio Bell*, the "deeper vice is this, that even now we do not know the particular or evidential facts of which [the OFCCP's outside expert] took judicial notice and on which [he] rested [his] conclusion. Not only are the facts unknown; there is no way to find them out." 301 U.S. at 302.

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[25] *See also Gonzales v. United States*, 348 U.S. 407, 413-14 (1955) (petitioner entitled to know thrust of agency's recommendations so he can muster facts and arguments to meet them); and *Simmons v. United States*, 348 U.S. 397, 405 (1955) (notice of adverse charges essential to basic fairness).

[26] In *Brock*, this Court held that a Department of Labor order of preliminary reinstatement of a discharged employee under the Surface Transportation Assistance Act, 49 U.S.C. § 2305, deprived the employer of due process because it "was denied access to the information upon which the Secretary based the order for [the employee's] preliminary reinstatement."___U.S. at___, 55 U.S.L.W. at 4533.

In sum, this Court should correct what, we submit, is an erroneous interpretation of threshold due process requirements. Otherwise agencies will be permitted to adjudicate factual questions affecting substantial property rights based on secret evidence.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

DATED: January 8, 1988

Respectfully submitted,

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87-1159

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

CNA FINANCIAL CORPORATION, CONTINENTAL ASSURANCE COMPANY, and CONTINENTAL CASUALTY COMPANY,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and DIRECTOR OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A
OPINIONS AND ORDERS

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2169

CNA FINANCIAL CORPORATION, *et al.*, APPELLANTS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 77-00808)

Argued December 8, 1981

Decided September 29, 1987

Jeffrey S. Goldman, with whom *Martin K. Denis* and *Deborah Crandall* were on the brief, for appellants. *Andrew M. Kramer* also entered an appearance for appellants.

Michael J. Ryan, Assistant United States Attorney, with whom *Charles F. C. Ruff*, United States Attorney, *Royce C. Lamberth*, *Kenneth M. Raisler*, *John H. E.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Bayly, Jr., Assistant United States Attorneys, and *James M. Kraft*, Attorney, Department of Justice, were on the brief for appellees.

Ronald M. Green, *Frank C. Morris, Jr.*, *Robert E. Williams* and *Douglas S. McDowell* were on the brief for Equal Employment Advisory Council, *amicus curiae*, urging remand.

Before WALD, *Chief Judge*, ROBINSON and MIKVA*, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: This reverse-Freedom of Information Act (FOIA) case [1] features two important issues: the exact scope of 18 U.S.C. § 1905, commonly referred to as the Trade Secrets Act,[2] and its relationship

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* *Circuit Judge* Mikva replaced *Circuit Judge* Tamm, who died after oral argument in this case.

[1] "Reverse-FOIA" actions are now a common species of FOIA litigation. Jurisdiction over these cases is conferred by 28 U.S.C. § 1331(a) (1982), while § 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1982), supplies the cause of action. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317 & n.47, 99 S.Ct. 1705, 1725 & n.47, 60 L.Ed.2d 208, 234 & n.47 (1979). Typically, a submitter of information—usually a corporation or other business entity required to report various and sundry data on its policies, operations, or products—seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request. The agency's decision to release the data normally will be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions.

[2] The Trade Secrets Act is part of the 1948 revision and codification of Title 18, the Criminal Code. See Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683, 791, amended by Pub. L. No. 96-349, § 7(b), 94 Stat. 1158 (Sept. 12, 1980). The text of the Trade Secrets Act appears *infra* at text accompanying note 39.

to FOIA Exemptions 3[3] and 4.[4] In past cases, we have repeatedly touched upon these difficult questions, but never squarely decided them.[5] We resolve them definitively today.

I. Background

We begin by reducing the background of this appeal to its essence. Appellant CNA[6] is an insurance company

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[3] 5 U.S.C. § 552(b)(3) (1982). The text of Exemption 3, the withholding statute exemption, appears *infra* at text accompanying note 35.

[4] 5 U.S.C. § 552(b)(4) (1982). The text of Exemption 4, the trade secrets and confidential financial information exemption, appears *infra* at note 71.

[5] We have acknowledged, and even indicated our views on, these questions in prior cases. See, e.g., *United States Int'l Trade Comm'n* v. *Tenneco West*, —— U.S.App.D.C. ——, —— & nn.4-5, 822 F.2d 73, 77-78 & nn.4-5 (1987); *Webb* v. *Department of Health & Human Serv.*, 225 U.S.App.D.C. 19, 26 n.48, 696 F.2d 101, 108 n.48 (1982); *Goland* v. *CIA*, 197 U.S. App.D.C. 25, 36 n.61, 607 F.2d 339, 350 n.61 (1978), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980); *National Parks & Conservation Ass'n* v. *Kleppe*, 178 U.S. App.D.C. 376, 389-390, 547 F.2d 673, 686-687 (1976); *Charles River Park "A", Inc.* v. *HUD*, 171 U.S.App.D.C. 286, 292 n.7. 519 F.2d 935, 941 n.7 (1975); *Robertson* v. *Butterfield*, 162 U.S.App.D.C. 298, 300 n.6, 498 F.2d 1031, 1033 n.6 (1974), *rev'd sub nom. FAA* v. *Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975); *Grumman Aircraft Eng'g Corp.* v. *Renegotiation Bd.*, 138 U.S.App.D.C. 147, 149 n.5, 425 F.2d 578, 580 n.5 (1970). But we have been careful to note that these observations are dicta. See, e.g., *Worthington Compressors, Inc.* v. *Costle*, 213 U.S.App.D.C. 200, 210-211 & n.63, 662 F.2d 45, 55-56 & n.63 (1981); *Sears, Roebuck & Co.* v. *GSA*, 180 U.S.App.D.C. 202, 207-209, 553 F.2d 1378, 1383-1385. *cert. denied*, 434 U.S. 826, 98 S.Ct. 74, 54 L.Ed.2d 84 (1977); *National Parks & Conservation Ass'n* v. *Kleppe*, *supra*, 178 U.S.App.D.C. at 389 n.46, 547 F.2d at 686 n.46.

[6] There are actually three appellants—CNA Financial Corporation, Continental Assurance Company, and Continental

doing business with the Federal Government.[7] As a condition of receiving federal contracts, and by virtue of the mandate of Executive Order 11,246,[8] it must submit to the appropriate governmental agency various materials demonstrating its performance in hiring, promoting, and otherwise utilizing women and minorities, as well as its affirmative action goals for the future.[9] These materials take the form of EEO-1 reports and affirmative action programs.[10] In 1977, when the FOIA requests instigat-

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Casualty Company. The latter two are affiliates of CNA. See Brief for Appellants at ii-iii (D.C. Cir. Rule 8(c) Certificate). Their interests apparently being identical, these three have referred to themselves collectively as "CNA," see, e.g., *id.* at 1 n.1, and we will follow suit.

[7] Complaint ¶¶ 2-3, *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C.) (filed May 13, 1977), reproduced in Joint Appendix (J. App.) 34-35.

[8] 30 Fed. Reg. 12,319 (1965), *reprinted after* 42 U.S.C. § 2000e (1982). Executive Order 11,246 prohibits discrimination by government contractors on the basis of race, religion, or national origin. Executive Order No. 11,375, 32 Fed. Reg. 14,303 (1967), amended that order to include a prohibition on gender-based discrimination.

[9] For a more detailed account of the substantive and procedural obligations imposed on federal contractors by the executive order and implementing regulations, see Brody, *Congress, the President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers*, 60 B.U.L. Rev. 239, 269-281 (1980).

[10] See generally 41 C.F.R. § 60-1.7 & pt. 60-2 (1986). "Employers' EEO-1 Reports set forth the number of persons employed in nine broad occupational categories such as 'Officials and Managers,' 'Operatives,' and 'Laborers.' They also show the number of employees in five race/ethnic categories by sex." *CNA Finan. Corp.*, 24 Fair Empl. Prac. Cas. (BNA) 877, 879 n.3 (OFCCP 1980), J. App. 144 n.3. One commentator has summarized the applicability and contents of the affirmative action programs as follows:

> Contractors with fifty or more employees who hold a federal contract with a value of at least $50,000 must

ing the present dispute were made, the agency charged with enforcing the insurance industry's compliance with Executive Order 11,246 was the Department of Health, Education and Welfare (HEW), which in turn had delegated this responsibility to the Insurance Compliance Staff (ICS) of the Social Security Administration.[11]

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formulate and file with OFCCP [Office of Federal Contract Compliance Programs] a written "Affirmative Action Program." OFCCP describes an Affirmative Action Program as "a set of specific and result oriented procedures to which a contractor commits itself to apply every good faith effort." The plan must contain a detailed analysis of job categories, hiring trends, and promotional patterns, through which the contractor must locate every point at which he is deficient in the utilization of minorities and women. In this search for problem areas, he must make an "in-depth analysis" of transfer practices, seniority provisions, formal and informal training programs, company sponsored social, recreational and educational events, and workforce attitudes. For every identified deficiency, the Executive Order requires the contractor to develop specific, numerical goals and timetables. These must be designed "to achieve prompt and full utilization of minorities and women, at all levels and in all segments of [his] workforce." They should be ambitious enough to reflect the "results which reasonably could be expected from putting forth every good faith effort to make [his] overall affirmative action program work." Goals and timetables must be predictive. They should take into account future alterations in both the contractor's workforce and the relevant labor pool, and they should be calculated according to anticipated response to a vigorous recruiting campaign. If the contractor fails to establish a goal in any area, he must prove to OFCCP's satisfaction that no improvement is needed there.

Brody, *supra* note 9, 60 B.U.L. Rev. at 276-277 (quoting OFCCP regulations) (footnotes omitted).

[11] Originally, responsibility for monitoring compliance with Executive Order 11,246 was dispersed among various departments and agencies. On October 1, 1978, federal contract

In April of 1977, a group called Women Employed requested from ICS [12] copies of the 1976-77 affirmative action programs and EEO-1 reports for CNA's midwest regional office, the 1974-75 affirmative action programs and EEO-1 reports for CNA's home office, and several documents prepared by ICS concerning CNA's compliance with the executive order.[13] On being notified by ICS both of the FOIA request and of the agency's intention to honor it,[14] CNA sought and obtained from the District

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compliance authority was consolidated in OFCCP, an office within the Department of Labor. See Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (1978), *reprinted after* 42 U.S.C. § 2000e (1982). This transfer of function explains why the heads of OFCCP and the Department of Labor were named as defendants in this litigation.

[12] Actually, some of the documents called for in 1977 had first been sought by Women Employed in 1975. At that time, ICS reviewed the request and was prepared to release the material over CNA's objections when Women Employed declared that it was not certain that it wanted all the data initially identified. Matters were then held in abeyance pending Women Employed's clarification. On April 29, 1977, after almost eighteen months of silence, Women Employed filed a renewed and expanded request that included the documents originally sought as well as others of more recent vintage. See *CNA Finan. Corp.* v. *Donovan*, Civ. No. 77-0808 (D.D.C. Oct. 29, 1981) (memorandum opinion announcing grant of defendants' motion for summary judgment) at 2, J. App. 17; *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 878-879, J. App. 145-150.

[13] *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 878-879, J. App. 144-145. The latter group included compliance review reports, which contained the agency's assessment of CNA's progress in meeting its equal employment obligations, and corrective action programs and conciliation agreements, which set forth actions that CNA promised to take to correct deficiencies cited in the compliance review reports. See generally 41 C.F.R. §§ 60-1.20, 60-1.26 (e) (3), 60-1.33 (1986).

[14] Complaint ¶¶ 14-20, *supra* note 7, J. App. 37-38.

Court an order restraining release pending completion of the administrative appeal process.[15]

Then began the long and tortuous journey of this case, in the course of which it traveled back and forth between the District Court and the agency, with one fairly brief stop in this court. The specifics of this five-year odyssey are reserved for a later section of this opinion, wherein CNA's procedural challenges are discussed.[16] It is sufficient for the present to note that in determinations rendered in November, 1980, and July, 1981,[17] the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor—which by then had assumed the enforcement responsibilities previously exercised by ICS [18] —decided to release, pursuant to FOIA and regulations of OFCCP, all the material requested.[19]

In thus discarding CNA's objections to disclosure, OFCCP decided that the Trade Secrets Act is not a withholding statute within the meaning of Exemption 3.[20]

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[15] *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C. May 18, 1977) (memorandum order granting plaintiffs' motion for temporary restraining order); *id.* (D.D.C. June 29, 1977) (approval of stipulation extending duration of temporary restraining order).

[16] See Part IV *infra*.

[17] *CNA Finan. Corp.*, *supra* note 10; *CNA Finan. Corp.* (OFCCP July 17, 1981) (supplemental decision), J. App. 234-243.

[18] See note 11 *supra*.

[19] The documents, however, were not to be released unedited. In order to respect individual employees' privacy and to minimize any competitive utility of the information, OFCCP proposed to delete employee names, actual salary data, job codes, and post-1979 staffing projections. See *CNA Finan. Corp.*, *supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 885-887, J. App. 170-174, 196.

[20] *Id.* at 881-887, J. App. 155-158.

It then proceeded to consider whether the requested material fell within Exemption 4. Applying the test established by this court in *National Parks & Conservation Association* v. *Morton*,[21] OFCCP discounted CNA's claim that revelation of its affirmative action programs and EEO-1 reports would precipitate substantial competitive harm.[22] CNA had asserted, through various affidavits and depositions, that any such disclosure would, *inter alia*, facilitate raiding of its employees, with a concomitant increase in recruiting and training costs; deleteriously affect employee morale; generate adverse publicity by virtue of public "misconstruction" of the data; and reveal to competitors CNA's plans to enter, expand, or contract different markets and product lines.[23] OFCCP dismissed these concerns as overstated and speculative; it concluded that the information in the affirmative action programs and EEO-1 reports was neither so detailed nor so specific to CNA that it would have any particular competitive value to a rival.[24] The agency's estimates in

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[21] 162 U.S.App.D.C. 223, 228, 498 F.2d 765, 770 (1974).

[22] *CNA Finan. Corp.*, *supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 883-887, J. App. 160-174.

[23] These claims parallel assertions made in recent reverse-FOIA cases by other government contractors. See, e.g., *United Technologies Corp.* v. *Marshall*, 464 F.Supp. 845, 853-855 (D. Conn.), *remanded*, 24 Fair Emp. Prac. Cas. (BNA) 1018 (2d Cir. 1979); *Metropolitan Life Ins. Co.* v. *Usery*, 426 F.Supp. 150, 159-166 (D.D.C. 1976), *cert. denied*, 431 U.S. 924, 97 S.Ct. 2198, 53 L.Ed.2d 238 (1977), *aff'd and remanded for further proceedings sub nom. National Org. for Women* v. *Social Sec. Admin. (NOW)*, 237 U.S.App.D.C. 118, 736 F.2d 727 (1984); *Burroughs Corp.* v. *Brown*, 501 F.Supp. 375, 380-381 (E.D. Va. 1980), *vacated and remanded*, 654 F.2d 294 (4th Cir. 1981).

[24] *CNA Finan. Corp.*, *supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 883-887, J. App. 160-174. As noted, *supra* note 19, OFCCP proposed deletions of certain segments to minimize whatever competitive threat release might otherwise pose.

this regard were buttressed by its view that the data at issue, which were by then four to seven years old, were stale.[25] Having found no threat of competitive harm that would bring the requested material within Exemption 4, OFCCP concluded that FOIA mandated its disclosure.[26]

The District Court sustained OFCCP's final determination.[27] It agreed that the Trade Secrets Act is not an Exemption 3 withholding statute, and that substantial competitive harm was the appropriate standard for resolving the Exemption 4 question.[28] After denying CNA's request for a de novo evidentiary hearing, the court held that OFCCP's determination was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[29] Accordingly, it granted summary judgment for the agency and directed that the documents be released within fifteen days.[30] We granted a stay of this direction pending appeal.[31]

CNA now complains vigorously that it has not been afforded at any point—either before the agency or in the

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[25] See, e.g., *CNA Finan. Corp.*, *supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 885, 886, J. App. 168, 172.

[26] *Id.* at 883, 886-887, J. App. 160, 174.

[27] *CNA Finan. Corp.* v. *Donovan*, *supra* note 12.

[28] *Id.* at 10, J. App. 25.

[29] 5 U.S.C. § 706(2)(A) (1982). The District Court did not cast its holding in precisely these terms, but, since it cited this section of the APA, see *CNA Finan. Corp.* v. *Donovan*, *supra* note 12, at 11, J. App. 26, we presume that this was the standard of review applied. Clearly, the court neither undertook de novo review, see 5 U.S.C. § 706(2)(F) (1982), nor applied the substantial evidence standard, see *id.* § 706(2)(E).

[30] *CNA Finan. Corp.* v. *Donovan*, *supra* note 12, at 11, and accompanying order, J. App. 26.

[31] *CNA Finan. Corp.* v. *Donovan*, No. 81-2169 (D.C. Cir. Nov. 13, 1981).

District Court—an evidentiary hearing on its claims of competitive harm.[32] CNA's procedural challenges were largely resolved by our holding in *National Organization for Women* v. *Social Security Administration* (*NOW*),[33] and are discussed in Part IV of this opinion. Parts II and III address CNA's substantive claims respecting the scope and interrelationship of the Trade Secrets Act and Exemptions 3 and 4 of FOIA, and review CNA's contention that OFCCP improperly applied Exemption 4.

II. The Trade Secrets Act and Exemption 3

The third exemption of FOIA, as amended in 1976,[34] excepts from mandatory disclosure material

> specifically exempted from disclosure by statute (other than [the open meeting provisions of 5 U.S.C. § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[35]

We have had occasion in the past to recount the events leading up to the 1976 amendment, and to explicate the

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[32] CNA draws its asserted entitlement to this type of procedure from various sources: OFCCP's own regulations, set out in 41 C.F.R. pt. 60-63 (1986); § 10(e) of the APA, 5 U.S.C. § 706(2)(F) (1982); certain language about this section in *Chrysler Corp.* v. *Brown*, *supra* note 1; and, finally, the Due Process Clause of the Fifth Amendment, both in its general application and as specifically interpreted by this court in *Gray Panthers* v. *Schweiker*, 209 U.S.App.D.C. 153, 652 F.2d 146 (1980). These points were raised before the agency and in the District Court, and therefore are properly tendered on appeal.

[33] *Supra* note 23. Our consideration of the instant case has awaited the decision in *NOW*.

[34] Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976).

[35] 5 U.S.C. § 552(b)(3) (1982).

legislative goals that must inform our resolution of Exemption 3 questions.[36] Without reiterating that now-familiar history, we note simply that Subsections (A) and (B) were designed to narrow the scope of the prior-existing exemption by excluding those broadranging statutes that give an agency "*cart blanche* [*sic*] to withhold any information [it] pleases."[37] The "unmistakable thrust" of Exemption 3 as amended is "to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive branch."[38]

CNA contends that the Trade Secrets Act qualifies under both Subsections (A) and (B) as an Exemption 3 withholding statute. That Act reads as follows:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any exam-

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[36] See, e.g., *American Jewish Congress* v. *Kreps*, 187 U.S. App.D.C. 413, 416-420, 574 F.2d 624, 627-631 (1978).

[37] H.R. Rep. No. 880, pt. 1, 94th Cong., 2d Sess. 23, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2183, 2205.

As discussed in note 70 *infra*, the amendment to Exemption 3 proposed in Part 1 of the House Report was modified at several subsequent points in the legislative process. However, the original intention to overrule the Supreme Court's decision in *FAA* v. *Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975), which was expressed in that paragraph of the report from which the quoted phrase is taken, survived to engender the language finally enacted. See H.R. Rep. No. 1441 (Conf.), 94th Cong., 2d Sess. 25, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2244, 2261.

[38] *American Jewish Congress* v. *Kreps*, *supra* note 36, 187 U.S.App.D.C. at 417, 574 F.2d at 628; accord *Irons & Sears* v. *Dann*, 196 U.S.App.D.C. 308, 313, 606 F.2d 1215, 1220 (1979), *cert. denied*, 444 U.S. 1075, 100 S.Ct. 1021, 62 L.Ed.2d 757 (1980).

> ination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.[39]

After careful consideration, we believe the Trade Secrets Act does not satisfy the strictures of either Subsection (A) or (B).

We have heretofore explained that Subsection (A) "is too rigorous to tolerate any decisionmaking on the admininstrative level. It embraces only those statutes incorporating a congressional mandate of confidentiality that, however general, is 'absolute and without exception.' " [40] CNA's insistence that the Trade Secrets Act is such a ban on disclosure of trade secrets and other business data ignores the crucial phrase confining the prohibition to only those revelations that are "*not authorized*

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[39] 18 U.S.C. § 1905 (1982).

[40] *American Jewish Congress* v. *Kreps, supra* note 36, 187 U.S.App.D.C. at 417, 574 F.2d at 628 (footnotes omitted) (quoting 122 Cong. Rec. 28,473 (1976)) (statement of Rep. Abzug, sponsor). Compare *Founding Church of Scientology* v. *National Sec. Agency*, 197 U.S.App.D.C. 305, 308, 610 F.2d 824, 827 (1979) (subsection (A) not satisfied by 50 U.S.C. § 402 note, relating to secrecy of information about the National Security Agency) with *Seymour* v. *Barabba*, 182 U.S.App.D.C. 185, 187, 559 F.2d 806, 808 (1977) (subsection (A) satisfied by 13 U.S.C. § 9, relating to confidentiality of census materials).

by law." [41] If the sole possible source of disclosure-authorization were congressional enactment, we might agree that the Act contemplates no decisionmaking on the administrative level, and thereby satisfies Subsection (A) of Exemption 3. The Supreme Court has made clear, however, that duly promulgated agency regulations reasonably related to the purpose and scope of a statutory grant of substantive rulemaking authority can provide the requisite legal sanction for disclosure.[42] We think this potential for administrative authorization precludes the application of Subsection (A).[43] Whenever an agency has power to adopt substantive regulations governing public access to its files, the decision whether the Trade Secrets Act is to bar divulgence of commercial and financial material contained therein ordinarily will be made by the agency, not by Congress. More specifically, disclosure will be "not authorized by law" [44] just to the extent that the agency elects not to endorse release.

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[41] See text accompanying note 39 *supra* (emphasis added).

[42] See *Chrysler Corp.* v. *Brown*, *supra* note 1, 441 U.S. at 301-316, 99 S.Ct. at 1717-1724, 60 L.Ed.2d at 224-234.

[43] The provision of administrative authorization is not merely a theoretical possibility. The Department of Health & Human Services (HHS) promulgated a public access regulation, 20 C.F.R. § 422.435 (1985), which several courts upheld as effective to sanction disclosure for purposes of the Trade Secrets Act. See *Parkridge Hosp., Inc.* v. *Califano*, 625 F.2d 719, 722-724 (4th Cir. 1980); *Humana of Va., Inc.* v. *Blue Cross*, 622 F.2d 76, 78-79 (4th Cir. 1980); *Saint Mary's Hosp., Inc.* v. *Harris*, 604 F.2d 407, 410 (5th Cir. 1979); *Cedars Nursing & Convalescent Center* v. *Aetna Life & Cas. Ins. Co.*, 472 F.Supp. 296, 298 (E.D. Pa. 1979). This regulation was repealed by HHS in 1985. 50 Fed. Reg. 28,569 (1985). We express no opinion on the question decided in those cases; rather we merely point out that the implications of *Chrysler* have not been lost on administrative agencies.

[44] See text accompanying note 39 *supra*.

Of course, the fact that an agency possesses discretion to control the applicability of the Trade Secrets Act is fatal only to a Subsection (A) claim. Even statutes conferring considerable amounts of administrative discretion can fall within Subsection (B) of Exemption 3 if they either establish "particular criteria for withholding" or refer to "particular types of matters to be withheld." [45]

To meet the first prong of Subsection (B), the statute must "incorporate[] a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazards that Congress foresaw." [46] The Trade Secrets Act is patently deficient in this regard. As we have already explained, the Act, by prohibiting only *unauthorized* disclosures, leaves at least some agencies in a position to opt out of its strictures. Yet nothing in the Act directs or guides an agency in deciding whether it ought to exercise its power to authorize revelation of officially collected commercial and financial data.

Moreover, going a step beyond the agency's initial decision to permit some disclosure, the Trade Secrets Act in no way channels the discretion of agency decisionmakers in supplying authorization for specific cases.[47]

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[45] See text accompanying note 35 *supra*. We have noted that Exemption 3 is written in the disjunctive, so that a statute need satisfy only one of the three standards set out therein. See *Washington Post Co.* v. *Department of State*, 222 U.S.App.D.C. 248, 301-302, 685 F.2d 698, 701-702 (1982), *vacated as moot*, 464 U.S. 979, 104 S.Ct. 418, 78 L.Ed.2d 355 (1983); *Iron & Sears* v. *Dann*, *supra* note 38, 196 U.S.App. D.C. at 313, 606 F.2d at 1220; *American Jewish Congress* v. *Kreps*, *supra* note 36, 187 U.S.App.D.C. at 417, 574 F.2d at 628.

[46] *American Jewish Congress* v. *Kreps*, *supra* note 36, 187 U.S.App.D.C. at 417-418, 574 F.2d at 628-629.

[47] Cf. *id.* at 418, 547 F.2d at 629 (statutes cited as examples in legislative history of the 1976 amendment "imply a con-

Suppose, for example, an agency with substantive power to promulgate public access regulations duly adopts a rule stating:

> Disclosure of trade secrets and other business information will be deemed 'authorized' for purposes of the Trade Secrets Act only when the administrator determines that release is consistent with the public interest.

This hypothetical regulation embodies the kind of administrative *carte blanche* that Congress intended to curb by its amendment of Exemption 3,[48] yet nothing in the Trade Secrets Act suggests that such a wideranging regulation would be ineffective as a source of disclosure authority. Devoid of any normative content to steer the agency in determining when revelation of data would be deleterious, the Act is susceptible of invocation to bar disclosure at the whim of an administrator acting under such a regulation. Indeed, one of the fundamental difficulties with classifying the Trade Secrets Act as an Exemption 3 statute is that agencies conceivably could control the frequency and scope of its application through regulations adopted on the strength of statutory with-

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gressional sense that the crucial distinction lay between statutes that in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard") (emphasis in original).

[48] The statute involved in *FAA* v. *Robertson*, *supra* note 37, provided that the appropriate officials "shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of [the person objecting to disclosure] and is not required in the interest of the public." 49 U.S.C. § 1504 (1976). See *Washington Post Co.* v. *Department of States*, *supra* note 45, 222 U.S.App.D.C. at 301, 685 F.2d at 701; see also *American Jewish Congress* v. *Kreps*, *supra* note 36, 187 U.S.App.D.C. at 420, 574 F.2d at 631 (rejecting "the national interest" as a sufficiently particularized criterion for purposes of Exemption 3).

holding authorizations which do not themselves survive the rigors of Exemption 3.[49]

The Trade Secrets Act is no more successful in meeting the second prong of Subsection (B). The language of the Act is exceedingly broad.[50] Extending by its terms to information pertaining to "trade secrets," "processes," "style of work," "apparatus," "confidential statistical data," the amount or source of "income, profits, losses, or expenditures" and even the "identity" of "any person, firm, partnership, corporation, or association," [51] "encompasses virtually every category of business information likely to be in the files" of an agency.[52] The "oceanic"

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[49] The HHS regulation mentioned in note 43 *supra* presents just such a situation. It was promulgated pursuant to authority purportedly found in § 1106 of the Social Security Act, 42 U.S.C. § 1306 (1982), one of the two statutes that the Conference Report specifically identified as not qualifying under Exemption 3. See H.R. Rep. No. 1441 (Conf.), *supra* note 37, at 25, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2261. That the Secretary in that instance adopted a regulation that seems to provide for automatic disclosure of particular material upon receipt by HHS of a written request is beside the point; whatever power he may possess under § 1106 could be exercised to promulgate a regulation of the sort we hypothesized.

[50] In a subsequent section of this opinion, we consider the argument that the Trade Secrets Act should be construed to encompass a far more limited category of material than a literal reading of the statute would suggest. See Part III-A *infra*. Because we ultimately reject that thesis, we have no occasion to decide whether the Act would satisfy the requirements of Subsection (B) were it subject to this much narrower construction.

[51] See text accompanying note 39 *supra*.

[52] *Chrysler Corp.* v. *Schlesinger*, 565 F.2d 1172, 1186 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp.* v. *Brown*, *supra* note 1.

quality of the Act [53] is enhanced by the fact that it is addressed to every "officer or employee" of "any [federal] department or agency;" [54] moreover, it applies to any information discovered "in the course of [the employee's] employment or official duties or by reason of any examination or investigation made by, or return, report, or record made to or filed with" the department, agency, or employee.[55] In sum, the Trade Secrets Act appears to cover practically any commercial or financial data collected by any federal employee from any source in performance of the duties of his or her employment.

In determining in a prior case that Section 7(c) of the Export Administration Act [56] does not satisfy the second prong of Subsection (B), we explained that a nondisclosure statute's

> general applicability to anything that might happen to be encompassed within [an] array of information-gathering functions undermines any notion that [the statute] represents a congressional determination of the advisability of secrecy for any "particular type[] of matter[]," if for no other reason than that the agency has the power radically to expand the quantity and diversity of information in its files to intercept matter of a sort that Congress well might not have contemplated when considering the need for confidentiality.[57]

We think that reasoning is equally applicable here. Admittedly, the Trade Secrets Act lists several specific categories of data, but cumulation of the parts may at some

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[53] *Goland* v. *CIA*, *supra* note 5, 197 U.S.App.D.C. at 36 n.61, 607 F.2d at 350 n.61.

[54] See text accompanying note 39 *supra*.

[55] See text accompanying note 39 *supra*.

[56] 50 U.S.C. app. § 2406(c) (1982).

[57] *American Jewish Congress* v. *Kreps*, *supra* note 36, 187 U.S.App.D.C. at 420, 574 F.2d at 631 (footnotes omitted).

point become so extensive that what have been described as parts are in fact the whole; and that is true here. The comprehensive catalogue of items in the Trade Secrets Act accomplishes essentially the same thing as if it had simply referred to "all officially collected commercial information" or "all business and financial data received." [58] Given this encyclopedic character, and absent any limitation as to the agencies covered [59] or the sources of data involved,[60] we unhesitatingly conclude that the laundry list of information that the Act sets out does not specify "particular types of matters" for purposes of satisfying Subsection (B) of Exemption 3.[61]

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[58] Cf. 122 Cong. Rec. 24,212 (1976) (statement of Rep. McCloskey) (statute that "just says generally, '[a]ll information received,' . . . does not set specific criteria as to what must be kept secret").

[59] Cf., e.g., *Goland* v. *CIA*, *supra* note 5, 197 U.S.App.D.C. at 35-36, 607 F.2d at 349-350 (discussing 50 U.S.C. § 403g (1982), pertaining to information about activities of CIA); *Founding Church of Scientology* v. *National Sec. Agency*, *supra* note 40, 197 U.S.App.D.C. at 308-309, 610 F.2d at 827-828 (discussing 50 U.S.C. § 402 note (1982), pertaining to information about activities of National Security Agency); *Seymour* v. *Barabba*, *supra* note 40, 182 U.S.App.D.C. at 186-187, 559 F.2d at 807-808 (discussing 13 U.S.C. § 9 (1982), directed to officers and employees of Department of Commerce).

[60] Cf., e.g., *Irons & Sears* v. *Dann*, *supra* note 38, 196 U.S. App.D.C. at 313-314, 606 F.2d at 1220-1221 (discussing 35 U.S.C. § 122 (1982), pertaining to information contained in patent applications); *Seymour* v. *Barabba*, *supra* note 40, 182 U.S.App.D.C. at 186-188, 559 F.2d at 807-809 (discussing 13 U.S.C. § 9 (1982), pertaining to information furnished in census).

[61] See *National Parks & Conservation Ass'n* v. *Kleppe*, *supra* note 5, 178 U.S.App.D.C. at 389-390 & n.50, 547 F.2d at 686-687 & n.50. Compare *Washington Post Co.* v. *Department of State*, *supra* note 45, 222 U.S.App.D.C. at 402-403, 685 F.2d at 702-703.

For these reasons, we hold that the Trade Secrets Act does not, by virtue of Exemption 3, erect a disclosure bar that is impervious to the mandate of FOIA.[62] Our view that this legislation is one of those prior-existing nondisclosure edicts that have been at least partially superseded by FOIA's newer public access mandate is

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[62] Our holding that the Trade Secrets Act is not an Exemption 3 statute is consistent with the conclusions of several courts that have considered the question. See, e.g., *General Elec. Co.* v. *United States Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1401-1402 (7th Cir. 1984); *General Dynamics Corp.* v. *Marshall*, 607 F.2d 234, 235-236 (8th Cir. 1979); *United Technologies Corp.* v. *Marshall*, *supra* note 23, 464 F.Supp. at 850-851; *Westchester Gen. Hosp., Inc.* v. *HEW*, 464 F.Supp. 236, 242-243 (M.D. Fla. 1979); *Saint Mary's Hosp., Inc.* v. *Califano*, 462 F.Supp. 315, 317 (S.D. Fla. 1978), *aff'd on other grounds*, 604 F.2d 407 (5th Cir. 1979); *Nationwide Mut. Ins. Co.* v. *Friedman*, 451 F.Supp. 736, 742-743 (D. Md. 1978); *Crown Cent. Petroleum Corp.* v. *Kleppe*, 424 F.Supp. 744, 752-753 (D.Md. 1976); *Westinghouse Elec. Corp.* v. *Brown*, 443 F.Supp. 1225, 1234 (E.D. Va. 1977).

The Fourth Circuit reached a contrary conclusion in *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190, 1201-1203 (1976), *cert. denied*, 431 U.S. 924, 97 S.Ct. 2199, 53 L.Ed.2d 239 (1977). That decision was premised, however, on the Supreme Court's ruling in *FAA* v. *Robertson*, *supra* note 37, that Exemption 3 did not impliedly repeal any of the hundred-odd preexisting statutes which authorized withholding. Thus, the court reasoned, *Robertson* conclusively disposed of any argument that the Act is not an Exemption 3 statute. See 542 F.2d at 1202. Since the 1976 amendments to FOIA have undermined that approach, several courts have regarded the *Westinghouse* holding as effectively overruled. See, e.g., *United Technologies Corp.* v. *Marshall*, *supra* note 23, 464 F.Supp. at 850-851; *Nationwide Mut. Ins. Co.* v. *Friedman*, *supra*, 451 F.Supp. at 743; *Crown Cent. Petroleum Corp.* v. *Kleppe*, *supra*, 424 F.Supp. at 752-753; *Westinghouse Elec. Corp.* v. *Brown*, *supra*, 443 F.Supp. at 1234. In a recent statement on the subject, the Fourth Circuit has implicitly suggested that it no longer regards the Trade Secrets Act as an Exemption 3 statute. See *General Motors Corp.* v. *Marshall*, 654 F.2d 294, 297 & n.9 (4th Cir. 1981).

reinforced by several general observations about the two statutes.[63] This court has had occasion to remark that the Trade Secrets Act is "merely a general prohibition against *unauthorized* disclosure."[64] This was perhaps a rather abbreviated way of noting that the Act seems to embody a congressional judgment that private commercial and financial information should not be revealed by agencies that gather it, absent a conscious choice in favor of disclosure by someone with power to impart the force of law to that decision. The Act attempts to forestall casual or thoughtless divulgence—disclosure made without first going through a deliberative process—with an opportunity for input from concerned parties.[65] If we are correct in this assessment of the motivating force behind the Trade Secrets Act, then our holding, which effectively recognizes that FOIA can provide the requisite legal authorization to disclose agency-gathered commercial and financial data, does no violence to the legislative aim. FOIA is itself the product of a most thoughtful and deliberate weighing process, in which Congress considered the views of those who submit information, those who collect it, and those who desire it. Congress has twice since adjusted the balance in order more finely to tune the operation of FOIA to real-world concerns and

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[63] See generally 1 K. Davis, Administrative Law Treatise § 5:31, at 396-397 (2d ed. 1978).

[64] *National Parks & Conservation Ass'n* v. *Kleppe*, *supra* note 5, 178 U.S.App.D.C. at 390 n.50, 548 F.2d at 687 n.50 (emphasis in original).

[65] By this observation we are not, of course, reviving the discredited theory that the Trade Secrets Act is merely an "anti-leak" statute. See *Chrysler Corp.* v. *Brown*, *supra* note 1, 441 U.S. at 298-300, 99 S.Ct. at 1716-1717, 60 L.Ed.2d at 223-224. Rather, we mean disclosure, whether or not the result of official agency action, undertaken without the predicate of a duly authorized, well-considered, and properly undertaken exercise of quasi-legislative power.

constraints.[66] To the extent that commercial and financial data within the ambit of the Trade Secrets Act do not fall within one of the FOIA exemptions, particularly Exemption 4 or 6,[67] the decision has been made that on balance it ought to be unmasked in the interest of informing the public of the bases for governmental action.[68] To the extent that such data as trade secrets and confidential financial information are excepted from man-

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[66] In addition to the 1976 amendments to Exemption 3 that overruled *FAA* v. *Robertson*, *supra* note 37, see Pub. L. No. 93-502, 88 Stat. 1561 (1974) (*inter alia*, amending exemption 1 to overrule *EPA* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), and Exemption 7 to overrule a line of cases decided by this court, see *FBI* v. *Abramson*, 456 U.S. 615, 621-623, 102 S.Ct. 2054, 2059-2060, 72 L.Ed.2d 376, 383-384 (1982) (mandating release of reasonably segregable, nonexempt portions of records and modifying the fees provisions and establishing timetables for agency action)). The 1974 amendments were the result of several days of hearings by the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee, *U.S. Government Information Policies & Practices Administration & Operation of the FOIA* (Parts 4-9): *Hearings*, 92d Cong., 2d Sess. (1972-73), and extensive hearings before subcommittees of the Senate Judiciary and Government Operations Committees, *Executive Privilege, Secrecy in Government, Freedom of Information: Hearings*, 93d Cong., 1st Sess. (1973).

[67] Exemption 4 includes trade secrets and confidential commercial information, see note 71 *infra*, while Exemption 6 covers personnel, medical, and similar files. In some specialized business contexts, Exemption 8, dealing with reports prepared in the regulation of financial institutions, and Exemption 9, referring to geological maps and data concerning wells, may also be relevant.

[68] We have in the past suggested that the presence of Exemption 4 in FOIA significantly undercuts the argument that the Trade Secrets Act was intended to qualify as a withholding statute under Exemption 3. See *Grumman Aircraft Eng'g Corp.* v. *Renegotiation Bd.*, *supra* note 5, 138 U.S.App.D.C. at 149 n.5, 425 F.2d at 580 n.5.

datory disclosure by one or more of the exemptions that Congress has incorporated into FOIA, the Trade Secrets Act will bar a discretionary release unless, after notice and comment, an agency, possessing delegated power to do so, promulgates, a contrary rule having the force of law.[69] Clearly, this resolution does not undermine the foundation of the Trade Secrets Act by throwing open the door to wholesale, haphazard revelation of private financial and business data in the possession of governmental agencies.[70]

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[69] *Chrysler Corp.* v. *Brown, supra* note 1, 441 U.S. at 295-316, 99 S.Ct. at 1714-1725, 60 L.Ed.2d at 221-233; *Charles River Park "A", Inc.* v. *HUD, supra* note 5, 171 U.S.App.D.C. at 293-294, 519 F.2d at 942-943.

[70] Our review of the legislative material, particularly the history of the 1976 amendment to Exemption 3, does not definitively answer the question whether the Trade Secrets Act was intended by Congress to be a qualifying withholding statute. It does show, however, that our conclusion is consistent with congressional understanding.

The House Report on the Government in the Sunshine Act consisted of two segments. Part I, authored by the Committee on Government Operations, set forth a version of Exemption 3 encompassing matters "required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information." H.R. Rep. No. 880, pt. 1, *supra* note 37, at 25. Parallel language was inserted as an exception to the open meeting requirement of what is now 5 U.S.C. § 552b (1982). See *id.* at 26. This language was intended to overrule the Supreme Court's decision in *FAA* v. *Robertson, supra* note 37. See H.R. Rep. No. 880, pt. 1, *supra* note 37, at 9-10, 22-23, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2191, 2204-2205. The Government Operations Committee's report went on to state that "[s]imilarly, the Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is 'not authorized by law,' would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since disclosure is there authorized by law." *Id.* at 23, *reprinted in* [1976] U.S. Code Cong. &

Admin. News 2205; see also *id.* at 10, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2191. The Report cited this court's decision in *Charles River Park "A", Inc.* v. *HUD*, *supra* note 5, and explained:

> Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information.

Id. at 23, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2205.

Part II of the House Report, reflecting the views of the Judiciary Committee, liberalized the Government Operations Committee's version by amending it to read: "Required or *permitted* to be withheld from the public by any statute establishing particular criteria or referring to particular types of information." H.R. Rep. No. 880, pt. 2, 94th Cong., 2d Sess. 7, 25, *partially reprinted in* [1976] U.S. Code Cong. & Admin. News 2216-2217 (emphasis added). The parallel open meeting exemption was amended in the same way. *Id.* at 26. The Judiciary Committee's portion of the report does not refer to the Trade Secrets Act, nor was that Act mentioned during floor debates in the House. In the course of those debates, Representative McCloskey introduced what he described as simply a clarifying amendment, which placed Exemption 3 in a form almost identical to the final version:

> (3) specifically exempted from disclosure by statute (other than [the open meeting provisions of section 522b]) provided that such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

122 Cong. Rec. 24,211 (1976). This amendment was adopted as part of the House bill. *Id.* at 24,213.

The version of the Government in the Sunshine Act originally passed by the Senate did not undertake to amend Exemption 3 of FOIA. It did, however, contain an exemption from the open meeting requirement excepting meetings "re-

quired to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information." S. Rep. No. 354, 94th Cong., 1st Sess. 57 (1975). There was neither committee report nor floor discussion on how the Trade Secrets Act might fit into this exemption.

The Conference Report settled on the version passed by the House, with the amendment that Subsection (A) would read, "requires that the matters be withheld from the public *in such a manner as to leave no discretion on the issue.*" H.R. Rep. No. 1441 (Conf.), *supra* note 37, at 8 (emphasis added). The conferees voiced the expectation that this language would overrule *FAA* v. *Robertson*. *Id.* at 25, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2260-2261. They did not allude to the Trade Secrets Act, nor was that statute mentioned in the brief floor discussions that preceded adoption of the conference version in both Houses.

The parties have expended considerable energy in debating whether the Government Operations Committee's understanding of the interaction of the Trade Secrets Act and FOIA remained accurate after that Committee's version metamorphosed into the current language of Exemption 3. We think this debate is ultimately misguided. The reasons the Committee gave for its views on the Trade Secrets Act—that is, that the Act prohibited only unauthorized disclosures, and FOIA was by its very nature a disclosure authorization—really had nothing to do with the specific language of the amendment it proposed. Rather, the Committee's conclusion, identical to that earlier expressed by this court in *National Parks & Conservation Ass'n* v. *Kleppe*, *supra* note 5, 178 U.S. App.D.C. at 389, 547 F.2d at 686, seems to have been the product of a general, morphological analysis of the two statutes independent of the particular changes then contemplated. As such, the Committee's observations are less like contemporaneous statements of the intent of those who drafted the legislation than they are like *ex post facto* opinions on the proper interpretation of FOIA expressed in subsequent congressional oversight reports. See, e.g., discussion of oversight committee's reaction to judicial interpretation of Exemption 4, note 73 *infra*.

This is not to say that such expressions are irrelevant to our deliberations. Congressional oversight of the operation of FOIA has led to responsive interaction between Congress

III. The Trade Secrets Act and Exemption 4

Having determined that the Trade Secrets Act is not a withholding statute of sufficient rigor or particularity to satisfy Exemption 3, we next address the interrelationship of the Act and Exemption 4.[71] Specifically, we consider the position taken by some commentators,[72] and urged here by agency counsel, that, despite its apparent sweep, the Trade Secrets Act is no broader than its three predecessor statutes were combined. This is of much more than academic interest to federal agencies that currently do not have public access regulations qualifying as legal authorizations for disclosures otherwise prohibited by the

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and the courts as the body of law construing FOIA has developed. See note 66 *supra* and accompanying text. In these rather atypical circumstances, expressions of congressional approval of the course this court has taken in such cases as *Charles River Park "A"* provides some reassurance that we are on the right track. Cf. *FAA* v. *Robertson, supra* note 37, 422 U.S. at 267, 95 S.Ct. at 2148, 45 L.Ed.2d at 174. Moreover as we earlier noted with respect to the report of the Government Operations Committee, "each House had an opportunity to object to interpretation contained in that report." *American Jewish Congress* v. *Kreps, supra* note 36, 187 U.S.App.D.C. at 418 n.36, 574 F.2d at 629 n.36. In sum, we regard Part I of the House Report as some confirmation of the holding we reach today, but we rely on the reasons we have articulated.

[71] Exemption 4 excludes from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b)(4) (1982).

[72] E.g., Clement, *The Rights of Submitters to Prevent a Disclosure of Confidential Business Information: The Reverse FOIA Lawsuit*, 55 Tex. L. Rev. 587, 606-617 (1977); Note, *The Revitalization of Section 1905 of the Trade Secrets Act in Reverse Freedom of Information Act Suits*, 16 New Eng. L. Rev. 831, 862-870 (1981); see also Stevenson, *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*, 34 Admin. L. Rev. 207, 248 & n.175 (1982).

Trade Secrets Act. If the range of the Act is narrower than the scope of Exemption 4, there will be some commercial and financial data that these agencies will be free to release in their discretion, though they are not required to do so by FOIA. If, on the other hand, the reach of the Act is at least coextensive with that of Exemption 4, a finding that requested material falls within that exemption will be tantamount to a determination that these agencies cannot reveal it.[73]

A. *The Trade Secrets Act*

The Trade Secrets Act came as part of the 1948 revision and codification of the Federal Criminal Code.[74] In this process, a committee of legislators, judges, lawyers, and law book publishers[75] gathered together crim-

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[73] See, e.g., *Chrysler Corp.* v. *Brown*, *supra* note 1, 441 U.S. at 317-319 & n.49, 99 S.Ct. at 1725-1726 & n.49, 60 L.Ed.2d at 234-235 & n.49.

[74] Act of June 25, 1948, ch. 645, 62 Stat. 791 (codified in Title 18, United States Code).

[75] See *Hearing Before Subcomm. No. 1 of the House Judiciary Comm. on H.R. 1600 and H.R. 2055*, 80th Cong., 1st. Sess. 7-9 (1947) [hereinafter *Hearing Before Subcomm. No. 1*] (statement of Rep. Keogh, Chairman of Committee on Revision of the Laws), *reprinted in* United States Code Cong. Serv., 80th Cong., 2d Sess., *Official Legislative History of New Title 18, United States Code, Crimes and Criminal Procedure*, at 2692-2694 (1948) [hereinafter *Official Legislative History*]; *Hearing Before the House Comm. on Revision of the Laws on H.R. 5450*, 78th Cong., 2d Sess. 1-2 (1944) (statement of Rep. Keogh, chairman of committee, *reprinted in Official Legislative History*, *supra*, at 2661-2662; H.R. Rep. No. 304, 80th Cong., 1st Sess. 3-5 (1947), *reprinted in Official Legislative History*, *supra*, at 2436-2438; 92 Cong. Rec. 9,122 (1946) (statement of Rep. Keogh); 93 Cong. Rec. 5,049 (1947) (statement of Rep. (Robsion); *Official Legislative History*, *supra*, at xxvi-xxvii (listing members of revision staff and advisory committee).

inal provisions scattered throughout the United States Code and organized, edited, and consolidated them;[76] and the product was then enacted into positive law as Title 18. According to the Reviser's Notes,[77] the Trade Secrets Act was "[b]ased on" three preexisting provisions.[78] Section 216 of Title 18, which had made it a misdemeanor for any federal officer or employee to "divulge or make known in any manner whatever not provided by law" the "operations, style of work, or appartus of any manufacturer or producer" visited by the employee in the course of his or her official duties, or "the amount or source of income, profits, losses, [or] expenditures" disclosed in income tax returns;[79] Section 1335 of Title 19, also a

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[76] See generally H.R. Rep. No. 304, *supra note* 75, at 7-8, *reprinted in Official Legislative History, supra* note 75, at 2441-2442; 92 Cong. Rec. 9,122 (1946) (statement of Rep. Keogh).

[77] The Reviser's Notes were appended to the House Report, H.R. Rep. No. 304, *supra* note 75, *reprinted in Official Legislative History, supra note* 75, at 2444-2660, and were specifically referred to in the Senate Report. S. Rep. No. 1620, 80th Cong., 2d Sess. 2 (1948), *reprinted in Official Legislative History, supra* note 75, at 2427.

[78] H.R. Rep. No. 304, *supra note* 75, app. A127, *reprinted in Official Legislative History, supra* note 75, at 2587.

[79] The complete text read:

> It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any

misdemeanor statute, which had prohibited federal officers and employees from disclosing, "in any matter whatever not provided for by law. . . trade secrets or processes . . . embraced in any examination or investigation" of the Tariff Commission;[80] and Section 176a of Title 15, which had directed that "[a]ny statistical information furnished in confidence" to the Bureau of Foreign and Domestic Commerce was to be held confidential and used "only for the statistical purposes for which it [was] supplied."[81]

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manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

18 U.S.C. § 216 (1940).

[80] In its entirety it read:

It shall be unlawful for any member of the [Tariff] commission, or for any employee, agent, or clerk of the commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by the commission, or by order of the commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment.

19 U.S.C. § 1335 (1940).

[81] In full text it stated:

Any statistical information furnished in confidence to the Bureau of Foreign and Domestic Commerce by indi-

It is apparent from a comparison of the provisions of the Trade Secrets Act with those of the three earlier statutes from which the 1948 recodification drew its language, that the resulting whole was considerably greater than the sum of its parts. The remarkably scant legislative history of the 1948 Criminal Code[82] is virtually silent on the Trade Secrets Act. Except for brief remarks on some purely editorial matters, the Reviser's Note to the Act merely lists the antecedent statutes and declares that "[m]inor changes were made in translations and phraseology."[83] Neither the floor debates, the committee hearings nor the committee reports contain any reference to the new section embodying the Act.

It is contended that, in these circumstances, we should apply the canon of construction that absent a clear showing of legislative intent to work a change in the prior law, a codified provision is to be given the same substantive content as its source statute, despite any changes in phraseology. Resort to this principle, the argument continues, will demonstrate that the Trade Secrets Act prohibits disclosure only of the fairly limited kinds of material that were encompassed by the three antecedent

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viduals, corporations, and firms shall be confidential and shall be used only for the statistical purposes for which it is supplied. The Director of the Bureau of Foreign and Domestic Commerce shall not permit anyone other than the sworn employees of the Bureau to examine such individual reports, nor shall he permit any statistics of domestic commerce to be published in such manner as to reveal the identity of the individual, corporation, or firm furnishing such data.

15 U.S.C. § 176a (1940).

[82] Floor discussion in both houses occupies fewer than a dozen pages of the Congressional Record.

[83] H.R. Rep. No. 304, *supra* note 75, Appendix at A127-A128, *reprinted in Official Legislative History, supra* note 75, at 2587-2588.

statutes. We think the question of statutory interpretation presented here is not nearly so simple.

Indubitably, when Congress enacted the 1948 revision and codification of Title 18, its understanding was that "[t]he original intent of Congress is preserved."[84] But testimony by members of the drafting commission during two sets of House Committee hearings, as well as statements in the House Report, make clear that preservation of the "original intent" was not synonymous with absence of substantive change. The point was often made that the enactment represented a "revision" as well as a "codification," and that the former involved reconciling conflicts, harmonizing incongruities and inconsistencies traceable to piecemeal enactment, and omitting some superseded sections while updating others.[85] As Representative Keogh, sponsor of the legislation in the House and chairman of the Revision Committee, testified, "[t]he policy that [the Revision Committee] adopted . . . was

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[84] S. Rep. No. 1620, *supra* note 77, at 1, *reprinted in Official Legislative History, supra* note 75, at 2427; accord *Hearing Before Subcomm. No. 1, supra* note 75, at 38-39 (memorandum for Rep. Robsion), *reprinted in Official Legislative History, supra* note 75, at 2725; 94 Cong. Rec. 8,721 (1948) (statement of Sen. Wiley, Chairman, Judiciary Committee).

[85] See, e.g., *Hearing Before Subcomm. No. 1, supra* note 75, at 19 (statement of Judge Maris), 38-39 (memorandum for Rep. Robsion), *reprinted in Official Legislative History, supra* note 75, at 2705, 2725; *Hearing Before Comm. on Revision of the Laws, supra* note 75, at 6 (statement of William Barron, Chief Reviser), 16 (statement of Judge Holtzoff, Special Consultant to Revisers), 17-18 (statement of George Kneip, Criminal Division, Department of Justice), *reprinted in Official Legislative History, supra* note 75, at 2667, 2677, 2678-2679; H.R. Rep. No. 304, *supra* note 75, at 2, *reprinted in Official Legislative History, supra* note 75, at 2435; 95 Cong. Rec. 8,721 (1948) (statement of Sen. Wiley); 93 Cong. Rec. 5,049 (1947) (statement of Rep. Robsion).

to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive change of law." [86] This emphasis on avoidance of "controversial" change was reiterated during the hearings.[87]

Thus, while we must not attribute to the 1948 enactment any substantial disruption in prior congressional purpose or policy without first discerning clear evidence that such a departure was intended, the mere fact that we are dealing with a revision-codification does not dictate slavish adherence to the predecessor statutes without regard to whether the new version is essentially compatible with what went before. We are mindful that several times in the last quarter-century the Supreme Court has had occasion to address variances between codified laws and their statutory antecedents, and has held that the meaning of the original statute survived changes in phraseology. We think, however, that close examination of those cases reveals a far more careful and

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[86] *Hearings Before Subcomm. No. 1, supra* note 75, at 6 (statement of Rep. Keogh), *reprinted in Official Legislative History, supra* note 75, at 2691.

[87] *Id.* at 11 (statement of Rep. Keogh), *reprinted in Official Legislative History, supra* note 75, at 2696 ("we have sought to avoid as far as possible, Mr. Chairman, any substantive changes that did not meet with unanimity of opinion"); *id.* at 19 (statement of Judge Maris), *reprinted in Official Legislative History, supra* note 75, at 2705 ("at the same time care has been taken to make no changes in the existing laws which would not meet with substantially unanimous approval"); *id.* at 24 (statement of William Barron), *reprinted in Official Legislative History, supra* note 75, at 2710 ("all persons concerned in this work, have exercised extreme care to avoid any changes of substantive law, concerning which there might be any controversy"); see also 93 Cong. Rec. 5,049 (1947) (statement of Rep. Robsion) ("[y]ou will find no radical changes in the philosophy of our criminal law in this bill").

thoughtful approach to interpretation than wooden citation of a canon of construction would suggest.

In *United States* v. *Cook*,[88] a defendant argued that consolidation of two statutes into a single anti-embezzlement provision [89] effectively excluded a class of employees from the reach of the law. The Court began its analysis by pointing out that this class had been covered by one of the predecessor statutes;[90] indeed, it observed, Congress had emphasized that coverage just two years prior to the codification.[91] Noting that no "plausible reason" appeared for distinguishing between the class of employees at issue and all other groups of employees plainly subject to the statute,[92] the Court concluded that to accept the defendant's reading was to presume the occurrence in 1948 of a significant and seemingly illogical change in congressional thinking.[93] Nothing in the legislative history hinted at such a deviation; moreover, the language used in the codified version was, in the Court's view, capable of intercepting the disputed class.[94] In these circumstances, the Court held that the antecedent statutes furnished the appropriate measure of the codified provision.

City of Greenwood v. *Peacock*,[95] a case decided contemporaneously with *Cook*, also saw the Court scrupulously assessing preexisting legislative intent and policy

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[88] 384 U.S. 257, 86 S.Ct. 1412, 16 L.Ed.2d 516 (1966).

[89] 18 U.S.C. § 660 (1982).

[90] *United States* v. *Cook*, *supra* note 88, 384 U.S. at 258-260, 86 S.Ct. at 1412-1413, 16 L.Ed.2d at 517-518.

[91] *Id.* at 259, 262, 86 S.Ct. at 1413, 1415, 16 L.Ed.2d at 518, 520.

[92] *Id.* at 262, 86 S.Ct. at 1414, 16 L.Ed.2d at 519.

[93] *Id.*, 86 S.Ct. at 1414-1415, 16 L.Ed.2d at 519-520.

[94] *Id.* at 260-262, 86 S.Ct. at 1414, 16 L.Ed.2d at 519.

[95] 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966).

before determining that a change in phraseology did not work a difference in substance. At issue was a provision which, as codified, governed removal to federal courts of certain state criminal actions implicating civil rights.[96] The Court demonstrated at some length that the argued-for construction would divorce the removal provision from the specific historical and statutory context in which it had developed, and give it a tenor not responsive to the purpose for which it was enacted.[97] The proposed reading also would have expanded the scope of a statute which the Court was inclined to construe cautiously because of the obvious implications of federalism.[98] It therefore looked carefully for some sign of congressional intent to disturb the balance previously reached in this delicate area, and finding none, held that the codified language did not accomplish the modification suggested.

Two other cases reflect a similar pattern of analysis. Had the Court in *Fourco Glass Company* v. *Transmirra Products Corporation*[99] accepted a proposed interpretation of the codified venue provision there at issue,[100] the result would have been an effective overruling of one of its decisions, squarely on point, rendered just six years prior to codification.[101] As the legislative history gave no hint of congressional intent to reverse that ruling, the Court quickly concluded that the newer enactment had not modified the prior law. Contributing to this

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[96] 28 U.S.C. § 1443 (1982).

[97] *City of Greenwood* v. *Peacock*, *supra* note 95, 384 U.S. at 815-824, 86 S.Ct. at 1805-1810, 16 L.Ed.2d at 949-954.

[98] See generally *id.* at 831-835, 86 S.Ct. at 1814-1816, 16 L.Ed.2d at 959-961.

[99] 353 U.S. 222, 77 S.Ct. 787, 1 L.Ed.2d 786 (1957).

[100] 28 U.S.C. § 1400(b) (1982).

[101] *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, *supra* note 99, 353 U.S. at 224-225, 77 S.Ct. at 789-790, 1 L.Ed.2d at 788-789.

disposition was the Court's recognition that any other reading would have permitted a generic venue provision to supersede another provision specifically designed to set venue for the class of cases there involved.[102] The Court's reluctance to regard changed language in a codified statute of general applicability as evidence of a congressional policy shift in a specialized area of the law was also evident in *Tidewater Oil Company* v. *United States*.[103] According to the petitioner's reading of the interlocutory appeal provisions there involved,[104] the codification of Title 28 had effected a major transformation of appellate jurisdiction over governmentally-initiated civil antitrust cases. The Court reviewed the course of past legislative activity on that point[105] and concluded that it was a subject which consistently had been treated as "a peculiarly distinct matter."[106] The petitioner's position presupposed not only that Congress had intended to alter the law in this hitherto discrete area simply by modifying an across-the-board appeal provision, but also that in the process Congress had abandoned policies which for many years had guided legislative action on the subject.[107] The Court also perceived the potential for a host of practical problems were the statute to be read as the petitioner suggested.[108] Accordingly, instead of attributing to the codification so drastic a result, the

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[102] *Id.* at 228-229, 77 S.Ct. at 791-792, 1 L.Ed.2d at 790-791.

[103] 409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972).

[104] 28 U.S.C. § 1292 (1982).

[105] *Tidewater Oil Co.* v. *United States*, *supra* note 103, 409 U.S. at 154-163, 93 S.Ct. at 411-416, 34 L.Ed.2d at 380-386.

[106] *Id.* at 163, 93 S.Ct. at 416, 34 L.Ed.2d at 386.

[107] *Id.* at 165, 93 S.Ct. at 416-417, 34 L.Ed.2d at 387.

[108] *Id.* at 170-173, 93 S.Ct. at 419-421, 34 L.Ed.2d at 390-392.

Court searched the legislative history for some evidence of legislative intent, and found not only an absence of affirmative expression of congressional purpose to change existing law on the point, but also some material suggesting the opposite intention.[109]

In two other cases, the Court declined to find in the language of codified statutes a legislative determination to alter time-honored legal principles. The fact that a phrase had been deleted during codification of provisions governing awards of costs[110] was held insufficient in *Alyeska Pipeline Service Company* v. *Wilderness Society*[111] to demonstrate that Congress meant to disturb the "longstanding rule" restricting recovery by victorious litigants of their attorneys' fees.[112] Similarly, in *Muniz* v. *Hoffman*,[113] the Court was reluctant to adopt an expansive reading of a section[114] that "created an exception to the historic rule that there was no right to a jury trial in contempt proceedings."[115] To have applied the codification provision literally in that case would have disturbed a preexisting interaction between various labor statutes[116] and upset a previously established legislative compromise[117] that had survived challenge just the year

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[109] *Id.* at 166-168, 93 S.Ct. at 417-418, 34 L.Ed.2d at 387-389.

[110] 28 U.S.C. §§ 1920, 1923 (1982).

[111] 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

[112] *Id.* at 255-256 n.29, 95 S.Ct. at 1621 n.29, 44 L.Ed.2d at 152 n.29.

[113] 422 U.S. 454, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975).

[114] 18 U.S.C. § 3692 (1982).

[115] *Muniz* v. *Hoffman*, *supra* note 113, 422 U.S. at 470, 95 S.Ct. at 2187, 45 L.Ed.2d at 331.

[116] *Id.* at 458-468, 95 S.Ct. at 2181-2186, 45 L.Ed.2d at 324-330.

[117] *Id.* at 458-459 n.3, 95 S.Ct. at 2181-2182 n.3, 45 L.Ed.2d at 324-326 n.3.

prior to codification.[118] In those circumstances, the Court insisted on some clear evidence of congressional intent to work "a substantial change in accepted practice" through the 1948 revision.[119]

Looking at these cases in their entirety, it seems to us that the Supreme Court has clearly expressed its distrust of phraseology born of the revision-codification process in situations where the new language, if taken literally, would demonstrably conflict with settled precedent or policy, or significantly impede the operation of other, preexisting statutes. In other words, the Court's refusal to accept the purported facial meaning of recodified provisions has been the product, not of an automatic reaction to the mere fact that the language was different, but rather of a wariness to regard particular word-changes as indicative of intended changes of a substantive nature absent some evidence other than the language difference per se. By contrast, a case in which the codified version presents a rule worded differently from but not fundamentally inconsistent with what went before would seem to present far less reason for judicial hesitance to conclude that Congress meant exactly what it said.

At the same time, we recall that the Court has sometimes expressed its reasoning in codification cases in

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[118] *Id.* at 464-467, 472, 95 S.Ct. at 2184-2185, 2188, 45 L.Ed.2d at 328-329, 333.

[119] *Id.* at 470, 95 S.Ct. at 2187, 45 L.Ed.2d at 331.

Another case meriting brief mention is *Cass* v. *United States*, 417 U.S. 72, 94 S.Ct. 2167, 40 L.Ed.2d 668 (1974). Involved there was 10 U.S.C. § 687(a) (1976), which included a "rounding" provision to be applied in the computation of military readjustment pay. The Court refused to read the statute so as to affect *eligibility* for readjustment pay, noting that doing otherwise would introduce a computation formula that Congress had specifically rejected earlier by an amendment clarifying the prior statute. *Id.* at 79-81, 94 S.Ct. at 2171-2172, 40 L.Ed.2d at 674-675.

strong and unqualified terms. In *Muniz*, for example, it warned that "[i]n view of the express disavowals in the House and Senate Reports on the revisions of . . . the Criminal Code . . ., it would seem difficult at best to argue that a change in the substantive law could nevertheless be effected by change in the language of a statute without any indication in the Reviser's Note of that change." [120] Of course, as earlier stated,[121] the Reviser's Note to the Trade Secrets Act contains nothing suggesting a conscious decision to criminalize disclosures not within the purview of any of the three predecessor provisions. Nevertheless, and realizing that the question is exceedingly difficult, we think the Trade Secrets Act, as it emerged from the revision, did exactly that.

We base these conclusions partly on the view that a literal reading of the Act does not reflect a true conflict with the apparent original intent of the antecedent statutes.[122] For example, prohibiting federal employees from

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[120] 422 U.S. at 472, 95 S.Ct. at 2188, 45 L.Ed.2d at 332-333; see also *Hearing Before Comm. on Revision of the Laws*, *supra* note 75, at 11 (statement of William Barron), *reprinted in Official Legislative History*, *supra* note 75, at 2672; *Hearing Before Subcomm. No. 1*, *supra* note 75, at 8 (statement Rep. Keogh), *reprinted in Official Legislative History*, *supra* note 75, at 2693.

[121] See text accompanying note 83 *supra*.

[122] The legislative history of those statutes has been reviewed both by the Supreme Court, see *Chrysler Corp.* v. *Brown*, *supra* note 1, 441 U.S. at 296-298, 99 S.Ct. at 1714-1716, 60 L.Ed.2d at 221-223, and by commentators, see, e.g., Clement, *supra* note 72, at 607-613; Note, *supra* 72, at 862-867. We do not reiterate it, for little emerges from that history to illuminate the question here. It does seem a fair generalization, however to say that Congress was motivated by recognition that increased governmental access to financial records and commercial operations of individuals and entities—access needed to assist and enable enforcement of burgeoning federal regulatory and revenue-raising pro-

disclosing trade secrets obtained in the course of any of their official duties is obviously not the same as only prohibiting them from disclosing those trade secrets revealed in Tariff Commission proceedings, but surely this difference does not amount to such a conflict as would raise our suspicion that Congress did not really mean what it ultimately said. If anything, it might be argued that, as no reasonable basis appears for predicating the confidential status of trade secrets when they come into the possession of the Government, the Act expresses more perfectly the fundamental intent of Congress that such data be protected from unauthorized disclosure.[128]

Our conclusion also rests in significant part on a perception of how much violence the sought-after construction would do to the language of the Trade Secrets Act. To arrive at the "true" meaning of the Act, one would have to parse every significant phrase and qualify each segment with conditions not even faintly suggested by the words themselves. Thus, disclosure of information that "concerns or relates to" "trade secrets [or] processes" would be prohibited only if it originated in Tariff

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grams—had to be accompanied by some restraint on the freedom of governmental employees to disseminate such data to third parties.

[128] Indeed, it may be that the drafters, in the process of updating "archaic provisions," *Hearing Before Subcomm. No. 1, supra* note 75, at 19 (statement of Judge Maris), *reprinted in Official Legislative History, supra* note 75, at 2705, and harmonizing "incongruities and inconsistencies which, of necessity, exist when legislation is enacted piecemeal," *Hearing Before Comm. on Revision of the Laws, supra* note 75, at 18 (statement of George Kneip), *reprinted in Official Legislative History, supra* note 75, at 2678, considered it a logical, uncontroversial matter to safeguard the types of information protected by the predecessor statutes without regard to particular channels through which they happen to come into the possession of federal employees.

Commission proceedings;[124] secrecy of "operations, style of work, or apparatus" would be mandated only if these facts were known to the employee because of a personal visit to the site of manufacture.[125] Similarly, "confidential statistical data" would be shielded if it was furnished in confidence to the Bureau of Foreign and Domestic Commerce,[126] while nondisclosure of the "amount or source of income, profits, losses or expenditures" of any person or business would be required only if the employee discovered that information from examination of a tax return;[127] and the proscription on revealing information about the "identity" of a person or corporation would apply only if its release were made in the course of publishing statistics on domestic commerce.[128]

We recognize that "'words are inexact tools at best,'"[129] but there is a vast difference between dissecting a statute to arrive at its essential meaning and butchering it. In the codification cases we have discussed, the Supreme Court was confronted with questions of meaning that turned on the addition or deletion of single words, or at most a phrase. In dealing with legislative projects the size of the 1948 revision and codification, we do well to bear in mind the danger of attaching too much significance to such small changes, for these may easily be

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[124] See note 80 *supra*.

[125] See note 79 *supra*.

[126] See note 81 *supra*. Indeed, there would be substantial question whether such disclosure would be a criminal violation, for the source statute said nothing about criminal liability.

[127] See note 79 *supra*.

[128] See note 81 *supra*.

[129] *Tidewater Oil Co.* v. *United States*, *supra* note 103, 409 U.S. at 157, 93 S.Ct. at 413, 34 L.Ed.2d at 382 (quoting *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479, 63 S.Ct. 361, 363, 87 L.Ed. 407, 410 (1943)).

the product of inadvertence or a failure to appreciate the full consequences of minute alterations. In the case at bar, however, the variation is on a much grander scale. To say that the drafters constructed the Trade Secrets Act as they did and yet thought and intended that it mean exactly what its statutory forerunners had meant is to charge them with a degree of carelessness or sheer blindness that is utterly inconsistent with everything the legislative history reveals about the high quality of the Revision Committee,[130] and that we are unwilling to do.

Quite importantly, it is a criminal statute that we are construing here. To be sure, the case against a construction that substantially rewrites the statutory language is arguably weaker when the result narrows rather than expands the reach of the provision in question. Still, we are considerably more reluctant to engraft numerous and significant qualifications onto an apparently clear, unambiguous text where the provision is criminal rather than civil in nature. We realize, however, that the drafters of the 1948 revision and codification were relying on the normal disinclination of courts lightly to infer intentional changes in meaning from mere changes in phrasing.[131] We recognize, too, that one of the primary goals toward which the revisers labored in their years of study and reformulation was that of rendering the law more readily accessible and comprehensible. As Representative Keogh

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[130] See materials cited in note 75 *supra*, and accompanying text. Cf. *FBI* v. *Abramson*, *supra*, note 66, 456 U.S. at 635, 102 S.Ct. at 2066, 72 L.Ed.2d at 391-392 (dissenting opinion) ("[i]n approaching a statute, moreover, a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation").

[131] See, e.g., *Hearing Before Subcomm. No. 1*, *supra* note 75, at 40 (statement of Charles Zinn, Law Revision Counsel), *reprinted in Official Legislative History*, *supra* note 75, at 2726-2727.

remarked when he introduced the bill that eventually was enacted,

> [i]t has been our aim in preparing this bill to furnish a modern, simple and understandable code of the Federal criminal law, in keeping with our motto, "making the laws understandable is as important as making the laws." [132]

For all of these reasons, then, we conclude that the scope of the Trade Secrets Act is not delimited by that of its three predecessor statutes.[133] To accept the facially unambiguous language of the Act as accurately expressing the congressional will does not require us to attribute to the 1948 enactment an abandonment of settled legal principles or an abrogation of preexisting precedent.[134]

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[132] 92 Cong. Rec. 9,122 (1946).

[133] This outcome receives at least oblique support from the Supreme Court's decision in *Chrysler Corp.* v. *Brown*, *supra* note 1, where the information at issue was of the same type of material—affirmative action programs and EEOC-1 reports—that is involved here. See 441 U.S. at 286-287, 99 S.Ct. at 1710, 60 L.Ed.2d at 215-216. These written submissions obviously did not come to the agency through income tax returns, Tariff Commission or Commerce Bureau proceedings, or personal visits by agency employees. Thus, they would on their face appear to fall outside the reach of the three forerunning statutes. Of course, the Court did not purport to decide that the material was indeed protected by the Trade Secrets Act, but it was well aware of the existence and scope of the three prior statutes, see *id.* at 296-298, 99 S.Ct. at 1714-1716, 60 L.Ed.2d at 221-223, and surely would not have remanded for an inquiry that would be patently fruitless. See also *id.* at 319 n.49, 99 S.Ct. at 1726 n.49, 60 L.Ed.2d at 235 n.49.

[134] Cf. *United States* v. *Cook*, discussed at text accompanying notes 88-94 *supra*; *City of Greenwood* v. *Peacock*, discussed at text accompanying notes 95-98 *supra*; *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, discussed at text accompanying notes 99-102 *supra*; *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, discussed at text accompanying notes 111-112 *supra*; *Muniz* v. *Hoffman*, discussed at text accompanying notes 113-119 *supra*.

It does not force us to assume that Congress *sub silentio* adopted a position it had earlier considered and rejected.[135] It does not present us with a result that appears illogical or arbitrary in light of the general policies that have informed prior legislative action in the area,[136] nor does it compel us to attribute to Congress an intent to alter the law in a hitherto discrete and specialized area by modifying a provision of general applicability.[137] On the contrary, the changes wrought by the Trade Secrets Act represent a uniform, comprehensive, and reasonable though perhaps stringent approach to discouraging unauthorized disclosures of private commercial and financial data entrusted to the Government. It is our considered view, therefore, that the scope of the Act is at least coextensive with that of Exemption 4 of FOIA,[138] and that,

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[135] *Cf. Muniz* v. *Hoffman*, discussed at text accompanying notes 113-119 *supra*; *Cass* v. *United States*, discussed at note 119 *supra*.

[136] Cf. *United States* v. *Cook*, discussed at text accompanying notes 88-94 *supra*; *Tidewater Oil Co.* v. *United States*, discussed at text accompanying notes 103-109 *supra*.

[137] Cf. *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, discussed at text accompanying notes 99-102 *supra*; *Tidewater Oil Co.* v. *United States*, discussed at text accompanying notes 103-109 *supra*.

[138] See also, *AT&T Information Sys.* v. *GSA*, 627 F.Supp. 1396, 1404-1405 (D.D.C. 1986) (accepting parties' agreement that "Exemption 4 and section 1905 of the Trade Secrets Act are co-extensive"); *Canal Ref. Co.* v. *Corrallo*, 616 F.Supp. 1035, 1042 (D.D.C. 1985) (ample precedent "supports the conclusion that Exemption 4 and § 1905 are coextensive"); cf. *9 to 5 Org. for Women Office Workers* v. *Board of Governors of the Federal Reserve Sys.*, 721 F.2d 1, 12 (1st Cir. 1983) ("if the government cannot prove that the requested documents are within FOIA exemption 4, their disclosure will not violate section 1905").

The Seventh Circuit appears to have a somewhat different conception of the relative scopes of Exemption 4 and the Trade Secrets Act. In *General Elec. Co.* v. *United States*

in the absence of a regulation effective to authorize disclosure, the Act prohibits OFCCP from releasing any information in CNA's affirmative action programs and EEO-1 reports that falls within Exemption 4.[139]

B. *Application of Exemption 4*

We next consider CNA's contention that OFCCP erred in its interpretation and application of the legal standard summoned by FOIA Exemption 4.[140] The controlling test in this circuit was articulated more than a decade ago in *National Parks & Conservation Assocation* v. *Morton*,[141] and has since been consistently followed.[142] In pertinent

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Nuclear Regulatory Comm'n, *supra* note 62, 750 F.2d at 1401-1402, the court stated rather broadly that "the Trade Secrets Act has no independent force in cases where the Freedom of Information Act is involved," and that if the requested document "is not protected by exemption 4, even more clearly it is not protected by section 1905 either." We understand the precise holding in *General Electric*, however, only to mean that the Trade Secrets Act is not more extensive than Exemption 4, a proposition not inconsistent with so much as we decide today.

[139] Because FOIA would provide legal authorization for and compel disclosure of financial or commercial material that falls outside of Exemption 4—and, of course, any other relevant exemption—we need not attempt in this case to define the outer limits of the Trade Secrets Act. Accordingly, we do not intimate any view on Professor Davis' suggestion that the Act really prohibits disclosures of the enumerated kinds of data only when they are truly confidential and not available from other sources. See 1 K. Davis, *supra* note 63, § 5:31, at 396.

[140] See Brief for Appellants at 36-44.

[141] *Supra* note 21.

[142] *Public Citizen Health Research Group* v. *FDA*, 227 U.S. App.D.C. 151, 161, 704 F.2d 1280, 1290 (1983); *Washington Post Co.* v. *U.S. Dep't of Health & Human Servs.*, 223 U.S. App.D.C. 139, 155, 690 F.2d 252, 268 (1982); *Worthington Compressors* v. *Costle*, *supra* note 5, 213 U.S.App.D.C. at 206, 662 F.2d at 51; *Board of Trade* v. *Commodities Futures*

part,[143] it states that commercial or financial information is "confidential" under Exemption 4 if disclosure of the information "is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained." [144] This criterion has been in-

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Trading Comm'n, 200 U.S.App.D.C. 339, 351, 627 F.2d 392, 404 (1980); *Gulf & W. Indus.* v. *United States*, 199 U.S.App. D.C. 1, 4, 615 F.2d 527, 530 (1979); *Exxon Corp.* v. *FTC*, 191 U.S.App.D.C. 59, 62 n.1, 589 F.2d 582, 585 n.1 (1978), *cert. denied*, 441 U.S. 943, 99 S.Ct. 2160, 60 L.Ed.2d 1044 (1979); *National Parks & Conservation Ass'n* v. *Kleppe*, *supra* note 5, 178 U.S.App.D.C. at 380-381, 547 F.2d at 677-678; *Braintree Elec. Light Dep't* v. *Department of Energy*, 494 F.Supp. 287, 289 (D.D.C. 1980).

[143] The first part of the test for confidentiality prohibits disclosure of information likely to "impair the Government's ability to obtain necessary information in the future." *National Parks & Conservation Ass'n* v. *Morton*, *supra* note 21, 162 U.S.App.D.C. at 228, 498 F.2d at 770. Because submission of equal employment and affirmative action material is generally compulsory for those who contract with the Federal Government, see 41 C.F.R. § 60-1.7 (1986), this prong of the *National Parks* test, is not at issue here. See *NOW*, *supra* note 23, 237 U.S.App.D.C. at 128 n.97, 736 F.2d at 737 n.97; *Public Citizen Health Research Group* v. *FDA*, *supra* note 142, 227 U.S.App.D.C. at 162 n.29, 704 F.2d at 1291 n.29; *Washington Post Co.* v. *U.S. Dep't of Health & Human Servs.*, *supra* note 142, 223 U.S.App.D.C. at 155-156, 690 F.2d at 268-269. Nor is the portion of Exemption 4 shielding "trade secrets" from disclosure under FOIA a concern here. See *Public Citizen Health Research Group* v. *FDA*, *supra* note 142, 227 U.S.App. D.C. at 157-161, 704 F.2d at 1286-1290 (adopting narrow definition of trade secrets).

CNA has contended briefly that the data at issue are "privileged" within the meaning of Exemption 4. See Brief for Appellant at 44-45. This argument was raised before neither the OFCCP nor the District Court and we therefore do not consider it here.

[144] *National Parks & Conservation Ass'n* v. *Morton*, *supra* note 21, 162 U.S.App.D.C. at 228, 498 F.2d at 770 (footnote omitted).

terpreted to require both a showing of actual competition and a likelihood of substantial competitive injury.[145] Because OFCCP explicitly stated the proper standard to be applied,[146] our review of the agency decision is confined

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[145] See *Gulf & W. Indus.* v. *United States*, *supra* note 142, 199 U.S.App.D.C. at 4, 615 F.2d at 530; *National Parks & Conservation Ass'n* v. *Kleppe*, *supra* note 5, 178 U.S.App.D.C. at 382, 547 F.2d at 679.

[146] See *CNA Finan. Corp.*, *supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 883, J. App. 160-161.

We decline CNA's invitation to abandon the *National Parks* standard for identifying Exemption 4 material, in favor of a test that focuses solely on whether the material is "customarily kept confidential" by the submitter. See Brief for Appellants at 35. CNA's assertion that this reassessment is somehow mandated by *Chrysler Corp.* v. *Brown*, *supra* note 1, is both an overstatement of the grounds of the Supreme Court's ruling and a misstatement of the grounds of ours.

We are aware that the *National Parks* standard—which, as we have said, requires a showing that disclosure is likely either to impair the Government's ability to collect needed information or to cause substantial competitive harm to the submitter—has been criticized. E.g., Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Admin. L. Rev. 193, 195-202 (1977). On the other hand, the *National Parks* interpretation of Exemption 4 has been accepted by numerous federal courts, see, e.g., *9 to 5 Org. for Women Office Workers* v. *Board of Governors*, *supra* note 138, 721 F.2d at 8-10; *Orion Research, Inc.* v. *EPA*, 615 F.2d 551, 554 (1st Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 103, 66 L.Ed.2d 38 (1980); *American Airlines, Inc.* v. *National Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *Continental Stock Transfer & Trust Co.* v. *SEC*, 566 F.2d 373, 375 (2d Cir. 1977); *Continental Oil Co.* v. *FPC*, 519 F.2d 31, 35 (5th Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2168, 48 L.Ed.2d 794 (1976); *Martin Marietta Aluminum Inc.* v. *GSA*, 444 F.Supp. 945, 948 (C.D. Cal. 1977); *United Technologies Corp.* v. *Marshall*, *supra* note 23, 464 F.Supp. at 852-853; *Hustead* v. *Norwood*, 529 F.Supp. 323, 326-327 (S.D. Fla. 1981); *Parkridge Hosp., Inc.* v. *Blue Cross & Blue Shield*, 430 F.Supp. 1093, 1096-1097 (E.D. Tenn. 1977), *vacated and remanded on other grounds*, 625

to the question whether OFCCP correctly applied that standard to the facts of this case.

F.2d 719 (4th Cir. 1980); *National Western Life Ins. Co.* v. *United States*, 512 F.Supp. 454, 461-462 (N.D. Tex. 1981); *Burroughs Corp.* v. *Brown*, 501 F.Supp. 375, 383 (E.D. Va. 1980), and the reliability of the legislative history offered in support of the "customarily kept confidential" standard has been questioned. See Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosure of Business Data*, 1981 Wis. L. Rev. 207, 233 n.134; see also the *1978 FOIA Oversight Report, House Comm. on Government Operations, Freedom Of Information Act Requests For Business Data In Reverse-FOIA Lawsuits*, H.R. Rep. No. 1382, 95th Cong., 2d Sess. 16-21 (criticizing "customarily withheld" test as having "a very insubstantial basis in the legislative history," and as "generally inconsistent with the language of the fourth exemption as well as the policy underlying FOIA"); *9 to 5 Org. for Women Office Workers* v. *Board of Governors, supra* note 138, 721 F.2d at 7.

We also note that the *National Parks* test became known to and acquiesced in by Congress. In 1976, when Congress was formulating the set of provisions that eventually became the open meeting rules of 5 U.S.C. § 552b, it looked to FOIA for assistance. Several of the exemptions that Congress then inserted to qualify the general mandate of public access were drawn directly from FOIA. See 122 Cong. Rec. 24,181 (1976) (statement of Rep. Abzug); *id.* at 24,212 (statement of Rep. McCloskey); *id.* at 28,473-28,474 (statement of Rep. Horton). The Senate version of the pertinent exemption permitted the closing of meetings where the discussion would

> disclose trade secrets, or financial or commercial information obtained from any person, where such trade secrets or other information could not be obtained by the agency without a pledge of confidentiality, or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates. . . .

S. Rep. No. 354, *supra* note 70, at 57. As is apparent from this language, the Senate bill essentially incorporated the *National Parks* criteria. The House bill reiterated exactly

As an initial matter, we note that the scope of review of OFCCP's decision is governed by the Administrative Procedure Act.[147] Review of the informal agency action contested here does not involve the "substantial evidence"

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the language that now comprises Exemption 4 of FOIA. See H.R. Rep. No. 880, pt. 1, *supra* note 37, at 26; pt. 2, *supra* note 70, at 26. When that bill was introduced by Representative Abzug, she explained that it exempted "information that would disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential, as interpreted in cases such as *National Parks & Conservation Ass'n* v. *Morton*." 122 Cong. Rec. 24,181 (1976) (citation omitted). Thus, when both Houses of Congress provided an exemption of trade secrets and confidential business information from the open-meeting requirement—an exemption intended to parallel the comparable FOIA exemption—they accepted the *National Parks* standard as appropriate. Accordingly, the Conference Report explained:

> The language of the House amendment regarding trade secrets and confidential financial or commercial information is identical to the analogous exemption in the Freedom of Information Act, 5 U.S.C. 522(b)(4), and the conferees have agreed to this language *with recognition of judicial interpretations of that exemption.*

H.R. Rep. No. 1441 (Conf.), *supra* note 37, at 15, *reprinted in* [1976] U.S. Code Cong. & Admin. News at 2251 (emphasis added).

This legislative history, while of course not shedding any light on the intent originally underlying enactment of Exemption 4 of FOIA, does reassure us that Congress was aware of *National Parks*, and thought well enough of its construction of FOIA's trade secrets exemption to incorporate it into the new open meeting legislation. Subsequently, the 1978 FOIA oversight report of the House Committee on Government Operations, although not giving unqualified approval to the *National Parks* test, discussed it in a generally positive fashion, and characterized it as a "significant stride in dealing with the problems of confidential business information." H.R. Rep. No. 1382, *supra*, at 19-24.

[147] See *Chrysler Corp.* v. *Brown*, *supra* note 1, 441 U.S. at 317, 99 S.Ct. at 1725, 60 L.Ed.2d at 234.

test, for no hearing on the record was required.[148] Rather, OFCCP's action may be set aside only on one or more of a limited number of bases, of which the relevant one is that it is "arbitrary, capricious [or] an abuse of discretion." [149] Our inquiry must be "searching and careful," [150] but "[a] court is not empowered to substitute its judgment for that of the agency." [151]

CNA and OFCCP disagree on what material is within the purview of Exemption 4. The data that OFCCP proposes to release can be grouped into three principal types: statistics on the racial and sexual composition of the workforce within various CNA departments; goals developed for equal employment purposes; and "applicant flow information" showing the percentage, by race and sex, of applicants hired from without and employees promoted from within.[152]

CNA's objections and the responses thereto by OFCCP may also be arranged in three occasionally overlapping categories. First, OFCCP says that much of the information sought by CNA to be confined is already publicly available,[153] and this assertion has not been contested

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[148] See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414-415, 91 S.Ct. 814, 822-823, 28 L.Ed.2d 136, 152 (1971); see also *Camp* v. *Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106, 111 (1973). The adequacy of the procedures utilized by OFCCP is more comprehensively discussed in Part IV *infra*.

[149] See *Worthington Compressors, Inc.* v. *Costle*, *supra* note 5, 213 U.S.App.D.C. at 205, 662 F.2d at 50.

[150] *Citizens to Preserve Overton Park* v. *Volpe*, *supra* note 148, 401 U.S. at 416, 91 S.Ct. at 284, 28 L.Ed.2d at 153.

[151] *Id.*

[152] *CNA Finan. Corp.*, *supra* note 17, at 2, J. App. 235.

[153] See, e.g., *CNA Finan. Corp.*, *supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 884, J. App. 164 (regulations requiring dissemination); *id.* at 886, J. App. 172 (Securities and Exchange Commission disclosures); *id.*, J. App. 173 (state filing requirement).

before this court. To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality—a *sine qua non* of Exemption 4.[154] We do not further consider CNA's arguments regarding these data.

Second, several of CNA's claims with respect to other information relate not to alleged competitive harm but rather to anticipated displeasure of its employees or to adverse public reaction. CNA has protested, for example, that release of information on the number of women and minorities hired might result in unfavorable publicity.[155] It also fears that its employees may become "demoralized" following disclosure of data showing the percentage of individuals promoted.[156] We have previously found such complaints unrelated to the policy behind Exemption 4 of protecting submitters from external injury.[157] These proffered objections simply do not amount to "harm flowing from the affirmative use of proprietary information by competitors."[158]

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[154] See *Worthington Compressors* v. *Costle*, *supra* note 5, 213 U.S.App.D.C. at 206, 662 F.2d at 51 ("[i]f the information is freely or cheaply available from other sources . . ., it can hardly be called confidential and agency disclosure is unlikely to cause competitive harm to the submitter").

[155] *CNA Finan. Corp.*, *supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 883, J. App. 162.

[156] *Id.* at 885, J. App. 168-169.

[157] See *Public Citizen Health Research Group* v. *FDA*, *supra* note 142, 227 U.S.App.D.C. at 162 n.30, 704 F.2d at 1291 n.30; Connelly, *supra* note 146, at 235-236. OFCCP expressed the same concern in its decision. See *CNA Finan. Corp.*, *supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 884, J. App. 163.

[158] *Public Citizen Health Research Group* v. *FDA*, *supra* note 142, 227 U.S.App.D.C. at 162 n.30, 704 F.2d at 1291 n.30 (" '[c]ompetitive harm should not be taken to mean simply any injury to competitive position, as might flow from

The remaining disagreements between CNA and OFCCP concern the long-range consequences of the release of the data at issue. CNA submitted affidavits predicting a number of harmful effects; OFCCP, while offering no independent evidence, has answered these contentions with its own predictions of the repercussions of disclosure. One noteworthy objection by CNA to revelation of applicant flow data is that it would enable competitors more easily to direct their recruiting efforts to the best sources of potential employees.[159] OFCCP counters with the logical rejoinder that these data will not be of any particular help to competitors since the employee-source and employee-position categories are broad, and the applicant pool is a function of the labor market and beyond an individual competitor's control.[160]

These and other similar contentions[161] presented no more than two contradictory views of what likely would

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customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to governmental officials or violations of civil rights, environmental or safety laws' ") (quoting Connelly, *supra* note 146, at 235-236).

[159] See *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 885, J. App. 167.

[160] *Id.*

[161] For example, CNA insisted that an outside recruiter armed with information supplied in its affirmative action and EEO-1 filings would be able to persuade CNA employees to leave for greener pastures. *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 885, J. App. 169-170. OFCCP sensibly responded that the employees themselves are likely to have the more accurate knowledge of the potential for advancement. *Id.* CNA further argued that use of the staffing figures set forth in its disclosures would allow competitors to observe subtle changes in CNA's allocation of personnel and thereby deduce its marketing strategies. *Id.* at 886, J. App. 171-172. After pointing out that much of this information was stale, *id.*, OFCCP observed that "the most

ensue upon release of information that CNA sought to protect. In each case, OFCCP retorted with reasonable and thorough prognoses of its own. We thus are confronted by the type of judgments and forecasts courts traditionally leave largely to agency expertise, with judicial review limited by the narrow standard sanctioned.[162] After careful consideration of OFCCP's decision, we are satisfied that it cannot in any way be characterized as arbitrary, capricious, or an abuse of discretion. CNA's objections were answered fully, and OFCCP's explanations of anticipated effects were certainly no less plausible than those advanced by CNA. Each of OFCCP's explanations is well reasoned, logical and consistent, and predictive judgments are not capable of exact proof. We find OFCCP's application of Exemption 4 entirely rational, and therefore legally permissible.

We find support for these conclusions in the deference the Supreme Court has accorded agency forecasts in other contexts. In a typical example, *FPC* v. *Transcontinental Gas Pipe Line Corp.*,[163] the Court upheld action by the Federal Power Commission based in part on a prediction that widespread, unrestricted direct sales of natural gas would probably result in price increases.[164] This prediction was grounded solely on the agency's expertise, and not on any material in the administrative record.[165] The Court specifically rejected the argument that the Commission "should have adduced testimonial and docu-

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a rival could gain from the staffing information . . . is some vague, indefinite insight into the firm's priorities . . . which would not be of significant competitive value." *Id.*

[162] See notes 147-151 *supra* and accompanying text.

[163] 365 U.S. 1, 81 S.Ct. 435, 5 L.E.2d 377 (1961).

[164] *Id.* at 29, 81 S.Ct. at 450, 5 L.Ed.2d at 395.

[165] The Court also found solace in the "common sense" of the argument accepted by FPC. See *id.* at 30, 81 S.Ct. at 450, 5 L.Ed.2d at 395.

mentary evidence to the effect that this forecast would come true." [166] More recently, in *FCC* v. *National Citizens Committee for Broadcasting*,[167] the Court held that an agency's "judgmental or predictive" determinations [168] need not be supported by record evidence.[169] The Court upheld, in the context of formal rulemaking regulations, barring initial licensing and transfer of broadcast facilities when a station and a daily newspaper in the same community shared common ownership.[170] The Court explained that " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " [171]

We are aware that FOIA applies to all executive agencies subject to its requirements, and that no agency is

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[166] *Id.* at 29, 81 S.Ct. at 450, 5 L.Ed.2d at 395.

[167] 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978).

[168] *Id.* at 813, 98 S.Ct. at 2121, 56 L.Ed.2d at 726. The Court characterized the questions determined as

> whether a divesture requirement would result in trading of stations with out-of-town owners; whether new owners would perform as well as existing crossowners, either in the short run or in the long run; whether losses to existing owners would result from forced sales; whether such losses would discourage future investment in quality programming; and whether new owners would have sufficient working capital to finance local programming.

Id. at 813-814, 98 S.Ct. at 2121, 56 L.Ed.2d at 726.

[169] *Id.* at 814, 98 S.Ct. at 2121, 56 L.Ed.2d at 726; see also *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241, 66 S.Ct. 75, 77, 90 L.Ed. 38, 42 (1945); *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 560-561, 65 S.Ct. 770, 776-777, 89 L.Ed. 1171, 1181-1182 (1945); 3 K. Davis, *supra* note 63, § 15.9, at 168-171.

[170] *FCC* v. *National Citizens Comm. for Broadcasting*, *supra* note 167, 436 U.S. at 779, 98 S.Ct. at 2104, 56 L.Ed2d at 704.

[171] *Id.* at 814, 98 S.Ct. at 2121, 56 L.Ed.2d at 726 (quotng *FPC* v. *Transcontinental Gas Pipe Line Corp.*, *supra* note 163, 365 U.S. at 29, 81 S.Ct. at 450, 5 L.Ed.2d at 395).

charged singly with its enforcement.[172] OFCCP, however, stands out in its endeavor to acquire additional expertise by hiring a consultant to evaluate the data submitted by CNA.[173] The report submitted by OFCCP's outside expert served as a fair substitute for agency experience and, when coupled with OFCCP's own evaluation of CNA's objections, produced a well-supported agency forecast. Given the Supreme Court's recognition of agencies' freedom to make predictive determinations in more formal settings without additional evidence, we conclude that the same discretion must be indulged to OFCCP's evaluations of the effect of release of the documents in dispute.

IV. Procedural Issues

In addition to the substantive questions we have discussed, CNA presents procedural challenges to the manner in which OFCCP and the District Court undertook to adjudicate its claims of serious competitive harm. A review of the procedural course by which this case arrived in this court will assist explanation of these claims.

A. *Procedural History*

After obtaining from the District Court, in April, 1977, an order restraining release pending completion of the administrative appeal process,[174] CNA filed with OFCCP a five-volume index specifying its objections to FOIA disclosure.[175] CNA supported its factual allega-

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[172] See *NOW*, *supra* note 23, 237 U.S.App.D.C. at 126 n.79, 736 F.2d at 735 n.79.

[173] See Part IV (C) *infra*.

[174] See note 15 *supra* and accompanying text.

[175] In format and content this index was similar to the type of document we prescribed in *Vaughn* v. *Rosen*, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

tions with affidavits or depositions of its director of employment,[176] its vice-president for personnel,[177] an outside personnel recruiter—or "headhunter" [178]—and a consultant with a doctorate in business administration.[179] No oral presentation was made. In October, 1978, OFCCP issued its first decision, which ordered release of the affirmative action programs and EEO-1 reports, with wage and certain identifying data deleted.[180] CNA promptly returned to the District Court seeking an injunction against any disclosure pending completion of judicial review.

On the District Court's refusal to impose the requested restraint,[181] CNA applied to this court and was granted an interim injunction.[182] We also stayed all proceedings in the case in order to benefit from the Supreme Court's

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[176] Affidavit of Gerald C. Hoglund, J. App. 56.

[177] Deposition of George L. Reichert, J. App. 98; Affidavit of George L. Reichert, J. App. 244.

[178] Deposition of Joseph Johnson, J. App. 81.

[179] Affidavit of Dr. Marcus Cook Bogue, III, J. App. 44. Apparently, Dr. Bogue also gave a deposition that was tendered to the agency, but that deposition is not incorporated into the appeal record.

[180] This decision was issued in the form of a letter dated October 4, 1978, from the Director of OFCCP to counsel for CNA. The letter was appended to a filing in which the agency defendants notified the District Court that administrative proceedings had terminated. See Attachment to Notice of Final Agency Decision, *CNA Finan. Corp.* v. *Donovan*, Civ. No. 77-0808 (D.D.C.) (filed Oct. 19, 1978).

[181] See *CNA Finan. Corp.* v. *Donovan*, Civ. No. 77-0808 (D.D.C. Nov. 7, 1978) (order denying plaintiffs' motion to amend temporary restraining order); *id.* (D.D.C. Nov. 9, 1978) (order denying plaintiffs' motion for injunction pending appeal).

[182] *CNA Finan. Corp.* v. *Marshall*, No. 78-2168 (D.C. Cir. Nov. 29, 1978).

impending decision in *Chrysler Corporation* v. *Brown*.[183] When *Chrysler* issued, we remanded the case to the District Court with directions to "order the appropriate agenc[y] to make new administrative determinations in accordance with [its] normal rules of practice and in light of the Supreme Court's opinion in *Chrysler Corporation* v. *Brown*."[184] Thus, in November, 1979, the matter was again before OFCCP.

At this juncture, CNA asked the agency to afford it an evidentiary hearing,[185] at which CNA presumably would have presented expert testimony and examined witnesses on whose opinions OFCCP intended to rely. By letter from the director of OFCCP, such a hearing was denied;[186] instead, the agency offered to accept any written submissions CNA cared to make.[187] In November, 1980, OFCCP issued its second and most detailed decision.[188] As we stated at the outset, the agency rejected CNA's legal arguments on the scope of FOIA Exemptions 3 and 4 and the Trade Secrets Act, and, as well, its factual assertions of competitive harm that al-

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[183] *Id.*

[184] *CNA Finan. Corp.* v. *Marshall*, No. 78-2168 (D.C. Cir. Oct. 5, 1979), J. App. 125.

[185] Letter from Jeffrey L. Berger, counsel for CNA, to Weldon J. Rougeau, Director of OFCCP (Jan. 4, 1980), J. App. 127.

[186] Letter from Weldon J. Rougeau to Jeffrey L. Berger (Feb. 15, 1980), J. App. 129.

[187] The record does not reflect what form this offer took. In its second decision, issued November 28, 1980, OFCCP recounts that "on May 28, 1980 [the Department of Labor] advised CNA that it would consider any written arguments and supporting documents submitted by CNA Financial Corp. as to why the records should not be disclosed." *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 881, J. App. 154.

[188] *CNA Finan. Corp., supra* note 10.

legedly would be precipitated by disclosure.[189] Returning once again to the District Court, CNA filed an opposition to the agency's decision.[190] It tendered four supplemental affidavits aimed at controverting OFCCP's conclusions about staleness of the requested data, and attacking several other elements of the agency's reasoning.[191]

At this point, some collateral procedural problems arose. It appeared that the agency, in forwarding the administrative record to the District Court, omitted three depositions CNA had submitted at the onset of the controversy.[192] More significantly, CNA discovered that OFCCP had engaged its own outside expert, Professor Boyd Fjelsted, to review CNA's submissions and render an opinion on the substantiality of the competitive threat they described.[193] CNA demanded the opportunity

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[189] See notes 20-26 *supra* and accompanying text.

[190] Memorandum in Opposition to an Administrative Decision to Disclose Data, *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C.) (filed Mar. 11, 1981).

[191] The affiants were John H. Hinrichs, a professor holding a doctorate in industrial and labor relations; David T. Rutenberg, a professor holding a doctorate in business administration; Patricia M. Higgens, CNA's equal employment opportunity compliance officer; and Philip L. Engel, CNA's vice-president of marketing. Appendix to Memorandum in Opposition to an Administrative Decision to Disclose Data, *supra* note 190, J. App. 197-225.

[192] These were the depositions of George L. Reichert, Joseph Johnson, and Dr. Bogue, see notes 177-179 *supra*. Plaintiff's Motion to Complete the Administrative Record, *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C.) (filed Mar. 2, 1981).

[193] This revelation apparently came through affidavits filed in the District Court by the director and the chief of special studies of OFCCP subsequent to our remand for reconsideration in light of *Chrysler*. In the course of completing its court-ordered review, OFCCP requested several extensions of time; these affidavits, which sought to explain why extensions

to review and respond to Fjelsted's reports;[194] OFCCP adamantly refused to reveal them;[195] and the District Court ordered *in camera* inspection.[196] After reviewing the reports, the court sustained OFCCP's refusal to disclose them on grounds that they constituted privileged "deliberative materials" of an "agency decisionmaker."[197] The court agreed with CNA, however, that the three omitted depositions should have been made a part of the record upon which the agency rested its decision.[198] It therefore remanded the matter to OFCCP with directions that the agency consider the depositions.[199]

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were warranted, referred to OFCCP's attempts to obtain the opinion of an outside economist, Dr. Fjelsted, on CNA's submissions and arguments. See Affidavit of Weldon J. Rougeau (filed Feb. 27, 1980) [hereinafter Rougeau Affidavit] and Affidavit of Robert E. Gelerter (filed July 1, 1980) [hereinafter Gelerter Affidavit], *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C.), J. App. 135-136, 137-139.

[194] See Plaintiff's First Request for Production of Documents (filed Jan. 27, 1981) and Plaintiff's Motion to Compel Discovery and Filing of the Entire Administrative Record, *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C.) (filed Jan. 30, 1981).

[195] Defendants' Motion for Protective Order and Opposition to Motion to Compel Discovery and Filing of the Entire Administrative Record, *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C.) (filed Feb. 9, 1981).

[196] *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C. Mar. 10, 1981) (order directing submission of documents for *in camera* inspection).

[197] *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C. May 29, 1981) (order granting defendants' motion for protective order) at 2, J. App. 226-227 [hereinafter Protective Order].

[198] *Id.* at 3, J. App. 228.

[199] *Id.* at 4, J. App. 229.

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On remand, CNA again requested an evidentiary hearing,[200] which again was denied. At the same time, it tendered to OFCCP the four supplemental affidavits it had presented to the District Court. OFCCP's third decision, issued in July, 1981, reaffirmed its earlier conclusions.[201] It found the depositions either merely cumulative of other material it had already reviewed, or, in some instances, actually inconsistent with that material.[202] The agency refused to take the four supplemental affidavits into account on grounds that they were beyond the scope of the District Court's remand order.[203] OFCCP represented nonetheless that it had looked at the affidavits and found them insufficient to change its views.[204]

Back in the District Court again, CNA requested alternatively a remand to OFCCP with directions to hold an evidentiary hearing, or resolution of the factual issues de novo in the District Court.[205] The court turned down the plea for remand. It held that, contrary to CNA's interpretation, OFCCP regulations did not contemplate an evidentiary hearing in order to evaluate a contractor's opposition to FOIA-release of its affirmative action materials.[206] The court also denied CNA's demand for con-

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[200] Letter from Jeffrey S. Goldman, counsel for CNA, to Ellen Shong, Director of OFCCP, with attached motion (June 17, 1981), J. App. 230-233.

[201] *CNA Finan. Corp. supra* note 17.

[202] See, e.g., *id.* at 3-4, 7-8, J. App. 236-237, 240-241.

[203] *Id.* at 9, J. App. 242.

[204] *Id.*

[205] Plaintiff's Motion to Remand Case, or, in the Alternative, to Obtain a De Novo Trial, *CNA Finan. Corp.* v. *Marshall*, Civ. No. 77-0808 (D.D.C.) (filed Aug. 17, 1981).

[206] *CNA Finan. Corp.* v. *Donovan, supra* note 12, at 6-7, J. App. 21-22.

The regulations upon which CNA relied are set out in 41 C.F.R. pt. 60-30 (1986). In rejecting CNA's argument, the District Court reasoned:

sideration of the issues de novo. It reasoned that the Administrative Procedure Act fixed the standard and scope of review at determination whether OFCCP's decision was arbitrary or capricious on the basis of the administrative record.[207] Accordingly, the court granted judgment for the agency without independently receiving any evidence.

B. *Adequacy of OFCCP Procedures*

CNA's broadest challenge is to the procedure employed by OFCCP in evaluating the competitive effect of releasing CNA's filings. CNA maintains that the agency's refusal to afford an evidentiary hearing violated its rights under the Due Process Clause, the Administrative Procedure Act, and OFCCP's own regulations.[208] CNA apparently believes that such a hearing is essential at the agency level to assure an adequate resolution of factual issues. We cannot agree.

We note initially, as did the District Court in its opinion,[209] the regulation governing contractors' objections to

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> [T]he hearing rules set out in Part 60-30 are expressly limited to proceedings concerning the enforcement of the Executive Order's equal opportunity goals. [41 C.F.R.] § 60-30.1. Although the [affirmative action program] materials at issue here were prepared in connection with the OFCCP's responsibility to enforce the presidential directive, a dispute over whether they are protected from disclosure under the Trade Secrets Act does not involve enforcement of equal opportunity.

CNA Finan. Corp. v. *Donovan, supra* note 12, at 6, J. App. 21. See notes 208-216 *infra* and accompanying text.

[207] *CNA Finan. Corp.* v. *Marshall, supra* note 12, at 10-11, J. App. 25-26.

[208] See Brief for Appellants at 16, 19-29.

[209] *CNA Finan. Corp.* v. *Donovan, supra* note 12, at 6-7, J. App. 21-22.

disclosure of affirmative action materials.[210] It requires a contractor to identify "the reasons why such information is not disclosable" [211] and, after an initial determination by OFCCP personnel, directs the agency to inform the contractor of its decision.[212] The regulation also provides for appeal of that ruling to the director of OFCCP, who must then render a "final determination." [213] The regulation makes no mention of an evidentiary hearing, or indeed of any review procedures at all. We can hardly take issue with the District Court's finding that OFCCP did not transgress its own skeletal constraints.

Hardly more substantial is CNA's claim that the agency factfinding procedures ran afoul of Section 10 of the Administrative Procedure Act [214] and impinged on the full spectrum of review assured by the Due Process Clause. This court recently entertained a nearly identical complaint in *NOW*, [215] in which we found the OFCCP review sufficient to allay concerns about fairness to the submitters of information.[216] The holding in *NOW* is dispositive on this issue, and we dismiss without further discussion CNA's claim in that regard.

C. *OFCCP's Expert's Report*

CNA registers an additional objection predicated upon OFCCP's refusal to produce Dr. Fjelsted's report for CNA's examination and rebuttal.[217] CNA believes that

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[210] 41 C.F.R. § 60-60.4(d) (1986).

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] 5 U.S.C. § 706(2) (1982).

[215] *Supra* note 23.

[216] 237 U.S.App.D.C. at 135-138, 736 F.2d at 744-747.

[217] Brief for Appellants at 19-21.

the information contained in this report weighed heavily in OFCCP's assessment of competitive effect, and that CNA's inability to respond specifically to the expert's conclusion constituted reversible error.[218] The agency, for its part, asserts that the report was a deliberative, predecisional document privileged against disclosure through discovery.[219] We discuss this issue separately because it demands careful balancing of the competing interests of both sides.

Our analysis begins, as it must, with a guarantee attending agency adjudication. A precept fundamental to the administrative process is that a party must have an opportunity to refute evidence utilized by the agency in decisionmaking affecting his or her rights.[220] A decade ago, in *Ralpho* v. *Bell*,[221] we declined to uphold a property valuation by the Micronesian Claims Commission that was based in part on evidence unavailable to Ralpho. A "value study," conducted and used by the Commission in assessing property claims, was actually an assemblage of interviews, records, and other data relating the average price of goods and services in Micronesia.[222] We held that, the Commission, by denying Ralpho an opportunity to inspect and counter the factual information compiled

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[218] *Id.* at 16, 20-21.

[219] Brief for Appellees at 14-23.

[220] *Morgan* v. *United States*, 304 U.S. 1, 18-19, 58 S.Ct. 773, 776, 82 L.Ed. 1129, 1132-1133 (1938); *Ohio Bell Tel. v. Public Utils. Comm'n*, 301 U.S. 292, 302-303, 57 S.Ct. 724, 729-730, 81 L.Ed. 1093, 1100-1101 (1937); *Ralpho* v. *Bell*, 186 U.S.App.D.C. 368, 389-390, 569 F.2d 607, 628-629 (1977); *Moore-McCormack Lines, Inc.* v. *United States*, 413 F.2d 568, 585, 188 Ct.Cl. 644, 671-672 (1969).

[221] *Supra* note 220.

[222] 186 U.S.App.D.C. at 374-375, 569 F.2d at 613-614.

in the study, impermissibly truncated even the minimal procedures required of an agency.[223]

The general requirements of disclosure to a litigant of material to be considered by an agency in an adjudicative proceeding[224] is modified where the agency asserts a privilege respecting material generated in the process of agency decisionmaking.[225] When agency material is "de-

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[223] *Id.* at 389-390, 569 F.2d at 628-629.

[224] See also Fed. R. Civ. P. 26(b)(1) (providing that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action").

[225] See, e.g., *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U.S.App.D.C. 385, 463 F.2d 788, *cert. denied*, 404 U.S. 917, 92 S.Ct. 242, 30 L.Ed.2d 191 (1971); *Freeman* v. *Seligson*, 132 U.S.App.D.C. 56, 405 F.2d 1326 (1968); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd*, 128 U.S.App.D.C. 10, 384 F.2d 979, *cert. denied*, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967). FOIA Exemption 5 embodies the privilege by excepting from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1982). See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1515-1516, 44 L.Ed.2d 29, 46-47 (1975); *EPA* v. *Mink*, *supra* note 66, 410 U.S. at 86-89, 93 S.Ct. at 835-837, 35 L.Ed.2d at 131-133. As the Supreme Court stated in *Mink*:

> It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies. And . . . that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

EPA v. *Mink*, *supra* note 66, 410 U.S. at 91, 93 S.Ct. at 838, 35 L.Ed.2d at 134; see also *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 150, 95 S.Ct. at 1516, 44 L.Ed.2d at 47; *McClelland* v. *Andrus*, 196 U.S.App.D.C. 371, 380 n.54, 606 F.2d 1278, 1287 n.54 (1979).

liberative" [226] or "recommendatory" [227] in character, and does not of itself inject new factual data into the calculus, the agency is privileged to withhold it. This privilege is designed to ensure the full measure of agency decisionmaking; [228] by removing the chilling effect of possible future disclosure, inhibitions on candid expression are dissolved.[229]

The materials at issue here consist solely of Dr. Fjelsted's information already submitted by CNA to OFFCP and his recommendations as to the course he felt it should follow.[230] Dr. Fjelsted did not provide any new data of his own. The District Court conducted an *in camera* inspection [231] of Dr. Fjelsted's reports and concluded:

> A review of the reports and the affidavit by Kenneth G. Patton, acting director of the OFCCP, demonstrates

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[226] E.g., *EPA* v. *Mink*, *supra* note 66, 410 U.S. at 89, 93 S.Ct. at 837, 35 L.Ed.2d at 133.

[227] E.g., *Coastal States Gas Corp.* v. *Department of Energy*, 199 U.S.App.D.C. 272, 284, 617 F.2d 854, 866 (1980).

[228] E.g., *Jordan* v. *Department of Justice*, 192 U.S.App.D.C. 144, 163, 591 F.2d 753, 772 (1978).

[229] See *McClelland* v. *Andrus*, *supra* note 225, 196 U.S.App. D.C. at 380, 606 F.2d at 1287 ("the purpose of this privilege is to foster freedom of expression among governmental employees involved in decisionmaking and policy formulation"); *Carl Zeiss Stiftung* v. *V.E.B. Zeiss, Jena*, *supra* note 225, 40 F.R.D. at 324-325 ("the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate, and thus achieves an objective akin to those obtained by other privileges more ancient and commonplace in character") (footnotes omitted).

[230] See Rougeau Affidavit, *supra* note 193, J. App. 135-136; Gelerter Affidavit, *supra* note 193, J. App. 137-139.

[231] Cf. *United States* v. *Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed.2d 727 (1953); *Black* v. *Sheraton Corp.*, 184 U.S. App.D.C. 46, 59, 564 F.2d 531, 544 (1977).

> that . . . [Fjelsted's reports] contain document-by-document recommendations to the agency as to how it should act on CNA's claims that disclosure would lead to competitive harm. These recommendations were part of the agency give-and-take by which its final determination was made.[232]

It is clear enough to us that OFCCP was entitled to shield from discovery reports consisting solely of analyses of data and recommendations of agency action predicated thereon. Unlike the appellant in *Ralpho* v. *Bell*,[233] CNA was not confronted with an unascertainable store of knowledge which it was called upon haphazardly to rebut. The factual information relied on by Dr. Fjelsted was, of course, available to CNA; indeed, much of it was supplied by CNA itself.[234] Furthermore, Dr. Fjelsted's analysis, though perhaps influential in OFCCP's appraisal of the commercial impact of the contested material, was in no sense binding, for OFCCP was free to modify or even reject these analyses and recommendations. We conclude that CNA has no legally cognizable basis for complaining of OFCCP's decision to withhold Dr. Fjelsted's report.

It likewise is clear that the agency's privilege to withhold the reports is unaffected by the fact that they were prepared by a consultant from outside the agency. In *Ryan* v. *Department of Justice*,[235] we recognized that

> [i]n the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in

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[232] Protective Order, *supra* note 197, at 2, J. App. 227.

[233] *Supra* note 220.

[234] See Protective Order, *supra* note 197, at 1-3, J. App. 226-228.

[235] 199 U.S.App.D.C. 199, 617 F.2d 781 (1980).

> public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.[236]

Thus, in that case we held exempt from production those nonfactual portions of responses by Senators to questionnaires propounded by the Attorney General.[237] Any material that might reveal decisionmaking or policymaking activity was considered privileged.[238]

Similarly, courts have repeatedly found that a privilege attaches to reports of outsiders commissioned by an agency to perform agency work, when such reports would be protected if compiled within the agency itself.[239] Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If information communicated is deliberative in character it is privileged from disclosure, notwithstanding its creation by an outsider.[240]

A moment's reflection will reveal the reason why. Professor Davis, in discussing the difficulty of the task confronting agency decisionmakers, has commented that "able administrators . . . have almost uniformly concluded that deciding officers should have the assistance

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[236] *Id.* at 207-208, 617 F.2d at 789-790.

[237] *Id.* at 209, 617 F.2d at 791.

[238] *Id.*

[239] See, e.g., *Soucie* v. *David*, 145 U.S.App.D.C. 144, 155 n.44, 448 F.2d 1067, 1078 n.44 (1971); *Lead Indus. Ass'n* v. *OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Hoover* v. *Department of Interior*, 611 F.2d 1132, 1138 (5th Cir. 1980); *Wu* v. *National Endowment for the Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972), *cert. denied*, 410 U.S. 926, 93 S.Ct. 1352, 35 L.Ed.2d 586 (1973).

[240] See Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1063-1066 (1973).

both of reviewing staffs and of agency specialists." [241] Moreover, it is clear that "deciding officers need the special strength that comes from ready access to staff specialists." [242] Then, too, federal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unravelling their knotty complexities.[243]

This is not to say that any material derived from an outside expert is inviolable; factual data, for example, are still susceptible to discovery.[244] But where, as here, a consultant is retained to evaluate information and submit recommendations as to decisions thereon, the advice or opinion transmitted to the agency is subject to privileged withholding. To force an exposure is to "stifle honest and frank communication" [245] between agency and expert by inhibiting their free exchange of thought.

D. *Proceedings Before the District Court*

CNA's final procedural challenge is to the level of scrutiny afforded in the District Court. CNA believed that it was entitled to de novo review, replete with tes-

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[241] 3 K. Davis, *supra* note 63, § 17:8, at 306.

[242] *Id.* § 17:10, at 309.

[243] See *Soucie* v. *David*, *supra note* 239, 145 U.S.App.D.C. at 155 n.44, 448 F.2d at 1078 n.44 (agencies frequently have "a special need for the opinions and recommendations of temporary consultants"); *Hoover* v. *Department of Interior*, *supra* note 239, 611 F.2d at 1138 (such advice from intermittant consultants often "plays an integral function in the government's decision").

[244] See, e.g., *EPA* v. *Mink*, *supra* note 66, 410 U.S. at 87-88, 93 S.Ct. at 836, 35 L.Ed.2d at 132-133; *Ralpho* v. *Bell*, *supra* note 220, 186 U.S.App.D.C. at 389-390, 569 F.2d at 628-629; *Montrose Chem. Corp.* v. *Train*, 160 U.S.App.D.C. 270, 273-274, 491 F.2d 63, 66-67 (1974).

[245] *Coastal States Gas Corp.* v. *Department of Energy*, *supra* note 227, 199 U.S.App.D.C. at 284, 617 F.2d at 866.

timony and cross-examination.[246] The District Court disagreed, confining itself to an examination of the record compiled before OFCCP.[247] Our reading of the Supreme Court's teachings in *Camp* v. *Pitts*[248] and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*,[249] together with our own conclusion in *NOW*,[250] convinces us that the District Court behaved entirely correctly.

Both *Camp* and *Overton Park* authorize de novo judicial review under the Administrative Procedure Act[251] only when the agency's factfinding procedures are inadequate."[252] Our decision in *NOW*[253] upheld the procedures employed by the OFCCP in reverse-FOIA actions—procedures which have largely been replicated here.[254] We thus sustain the District Court in its refusal to review the case de novo.

V. Conclusion

We agree with the District Court that "the agency's decision thoroughly discusses CNA's objections and pre-

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[246] Brief for Appellants at 21-29.

[247] See *CNA Finan. Corp.* v. *Donovan*, *supra* note 12, at 11, J. App. 26.

[248] *Supra* note 148.

[249] *Supra* note 148.

[250] *Supra* note 23.

[251] See 5 U.S.C. § 706(2)(F) (1982).

[252] *Camp* v. *Pitts*, *supra* note 148, 411 U.S. at 141-142, 93 S.Ct. at 1243-1244, 36 L.Ed.2d at 111; *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra* note 148, 401 U.S. 415, 91 S.Ct. at 823, 28 L.Ed.2d at 153.

[253] *NOW*, *supra* note 23, 237 U.S.App.D.C. at 135-138, 736 F.2d at 744-747.

[254] See notes 174-204 *supra* and accompanying text.

sents 'a reasoned and detailed basis for its decision.' " [255] Because the agency's decision to release the documents found to be outside Exemption 4 must be upheld, and because the procedures employed by OFCCP were legally sufficient, the stay instituted pending appeal [256] is dissolved and the decision of the District Court is

Affirmed.

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[255] *CNA Finan. Corp.* v. *Donovan, supra* note 12, at 10-11, J. App. 25-26 (quoting *General Motors Corp.* v. *Marshall, supra* note 62, 654 F.2d at 300).

[256] *CNA Finan. Corp.* v. *Donovan,* No. 81-2169 (D.C. Cir. Nov. 13, 1981).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1979

No. 76-2119
National Organization for Women Washington, D.C. Chapter

v.

Social Security Administration of the Department of Health, Education and Welfare, et al.

Prudential Insurance Company of America, Appellant

And Consolidated Case Nos. 76-2128, 76-2129, 76-2163, 77-1161, 77-1269 and 77-1270

No. 78-2061
Industrial National Bank of Rhode Island, Appellant

Civil Action No. 78-1579

v.

W. Michael Blumenthal, Secretary United States Department of Treasury

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And Consolidated Case No. 78-2146

No. 78-2168
CNA Financial Corporation, Continental Assurance Co., and Continental Casualty Company, Appellants

Civil Action No. 77-0808

v.

Ray Marshall, Secretary of Labor, et al.

FILED OCTOBER 5, 1979

BEFORE: Wright, Chief Judge, Bazelon, Senior Circuit Judge and Tamm, Circuit Judge

ORDER

On consideration of appellees' and appellants' pending motions, and responses thereto, it is

ORDERED by the Court that the federal appellees' motion to remand No. 76-2119 and consolidated case Nos. 76-2128, 76-2129, 76-2163, 77-1161, 77-1269 and 77-1270 is denied. It is

FURTHER ORDERED by the Court that in Nos. 78-2061 and 78-2168 the cases are remanded to the District Court with instructions to order the appropriate agencies to make new administrative determinations in accordance with their normal rules of practice and in light of the Supreme Court's opinion in *Chrysler Corp.* v. *Brown*, 99 S. Ct. 1705 (1979). The District Court should thereafter conduct such proceedings as may be appropriate.

Upon consideration of the motions for stay, it is

FURTHER ORDERED by the Court that appellees and their successors in office, agents, employees, and others acting in concert with them are hereby enjoined from releasing or disclosing in whole or in part to Women Organized for Employment, Women Employed, or any person who is not an agent, employee, or other person acting in concert with the appellees or their successors, any EEO-1 forms or other affirmative action materials for any of the appellants in Nos. 78-2061 and 78-2168 unless directed to do so by the District Court.
It is

FURTHER ORDERED by the Court that appellant Industrial National Bank's motion for summary reversal of the District Court's decision in Nos. 78-2061 and 78-2146 is denied.

The parties in Nos. 76-2119, et al are granted leave, be they so advised, to submit supplements to the briefs already on file within twenty days of the date of this order.

Per Curiam

Senior Circuit Judge Bazelon did not participate in the foregoing order.

IN THE UNITED STATES DEPARTMENT OF LABOR OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

In the Matter of the Disclosure of Documents Pertaining to CNA Financial Corporation } November 28, 1980

DECISION

This case concerns the disclosability to the public of certain documents submitted to the Government pursuant to Executive Order 11246 by CNA Financial Corporation and certain of its subsidiary companies, the Continental Assurance Company and the Continental Casualty Company (hereinafter "CNA" or the company).[1] On April 29, 1977 an organization with offices in Chicago, Women Employed, made a Freedom of Information Act request to the Department of Health, Education and Welfare[2] for records pertaining to CNA's compliance with Executive Order 11246. These documents are described as the

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[1] CNA is a Delaware corporation principally engaged in the sale of insurance and is the parent company of Continental Casualty Company and Continental Assurance Company. CNA and its subsidiaries are principally engaged in the sale of insurance and a portion of their business consists of contracts or subcontracts with agencies of the United States Government which are covered by Executive Order 11246.

[2] Prior to October 1, 1978 when the Executive Order Program was consolidated in the Department of Labor, various agencies known as "compliance agencies" had the day to day responsibility for enforcement of E.O. 11246 under the supervision of the Department of Labor. HEW was responsible, among other things, for compliance in the insurance industry. It delegated this responsibility to the Social Security Administration, which established a special staff for this purpose called the Insurance Compliance Staff (ICS).

1976-77 Affirmative Action Plan for the CNA Midwest Regional Life, Accident & Health Office in Chicago; the 1974-75 Affirmative Action Plan (AAP) for the Continental Casualty Company Corporate Home Office in Chicago (CNA-COHO); and "EEO-1"[3] reports for those facilities. Also requested were reports prepared by HEW concerning CNA's compliance with the requirements of Executive Order 11246 known as Compliance Review Reports, and agreements made between the agency and the company as a result of those reviews. The latter documents were described as Corrective Action Programs and Conciliation Agreements and specified future action to be taken by the company in order to bring its AAP into compliance with the equal opportunity requirements of its Government contracts and subcontracts. In addition, in May of 1978, the Government received from an organization known as Women Organized for Employment of San Francisco, California, a request for the then-current EEO-1 reports filed by the CNA Financial Corporation for its offices in Los Angeles, San Francisco, and Orange County, California.

The issue of disclosure of the documents is presently before the OFCCP on an order of remand issued by the United States District Court for the District of Columbia on November 2, 1979 in *CNA Financial Corp.* v. *Marshall*, Civil No. 77-0808. This remand order is the most recent step in a long and complex history of the request for disclosure of CNA documents both in the agencies and in the courts. Women Employed made its first request for documents pertaining to CNA in early 1975, when it filed with the Insurance Compliance Staff of the Social Security Administration (then in the Department of Health,

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[3] Employers' EEO-1 Reports set forth the number of persons employed in nine broad occupational categories such as "Officials and Managers, " "Operatives", and "Laborers". They also show the number of employees in five race/ethnic categories by sex.

Education & Welfare) a request to examine the "Utilization Analysis" portion of the 1974-75 Affirmative Action Program CNA had prepared for the Continental Casualty Company Corporate Home Office (CNA-COHA) in Chicago pursuant to the Executive Order. Also requested was a letter agreement which had been signed by Edward Noha, CNA's President, on February 13, 1975 in connection with the government's review of CNA.

On July 18, 1975, the HEW-ICS staff notified the company that the request had been received and requested that the company advise the agency if it contended that any portions of the documents should be withheld from disclosure and, if so, to state the reasons therefor. On July 22, 1975 James W. Cameron, Vice President of Personnel for CNA wrote to Everett Friedman, Chief of the Insurance Compliance Staff. Cameron's letter stated:

> We have no objection to your releasing copies of the base documents or narrative description of the plan, of the February 13 agreement or the letter of acceptance from the Insurance Compliance Staff. We do object, however, to your releasing copies of the utilization analysis. This contains confidential information which should not be released to any outside persons.

At a subsequent meeting Friedman informed CNA that its objection was insufficient to justify withholding the documents. The company was invited to set forth in writing more specific objections to the release of the material by July 30, 1975. None were forthcoming, despite follow-up calls. On August 1, 1975 Mr. Friedman informed Mr. Cameron that portions of the base document[4] had been

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[4] The base document of CNA's Affirmative Action Program was a separate volume which contained general information about the company's equal employment efforts and summary statistics about the employment of various racial and ethnic categories and for male and female employment. The remaining volumes broke

(Footnote continued on the following page)

provided to Women Employed as follows:

A. From the Base Documents of Continental Casualty's 1975 Affirmative Action Plan:

1. Chapter V Section A and B

2. Appendix 8

3. Appendix 9 (descriptive Material Only-Forms and Instructions Not Included)

On August 7, 1975 the company filed an action styled *Continental Casualty Company* v. *Dunlop*, Civil Action No. 75 C 2678 in the U.S. District Court for the Northern District of Illinois which sought to enjoin disclosure of the documents. Shortly thereafter the Government entered into a stipulation providing that no further release of information would be made pending review of the disclosure issue by the Office of Federal Contract Compliance in accordance with 41 CFR 60-60.4(d). CNA's attorneys then sent letters to the OFCCP (August 12 and 21, 1975) setting forth the company's objections to release of the utilization analysis portion of the AAP under 5 U.S.C. 552(b)(4) and (6).

On September 17, 1975, the Acting Director of the OFCCP issued his determination on CNA's appeal. The company's appeal was granted with respect to several categories of information described in the decision as:

> a) All names of employees of Continental Casualty Company wherever found in any of the documents contained in the Utilization Analysis.
>
> b) Dollar amounts of all salaries paid any employee as reflected on either the Incumbent or New Hire Wage Analysis portions of the Utilization Analysis.
>
> c) All social security numbers of employees of

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4 *(Continued)*
this information down into greater detail by organizational units within its offices.

the company which are included on the lists of courses taken and completed. (see Area 15 Unit 1; Research Planning and Education).

* * *

The entire portion designated by the unit name, "P.S.P." (Personal Social Security Plan). This section is more specifically designated by Cost Center Nos. 9300, 9304, 9307, 9310, 9315, 9317, 9320, 9332. This portion is found in the "National Account's Marketing, Volume 5"; J. Wiedmann, Area V.P., and in the supplemental report "National Accounts Marketing" (No. 8); Unit No. 2, submitted Dec. 2, 1974.

However, the Acting Director upheld the ICS' decision with respect to all other portions of the AAP.

After receiving this decision, CNA requested a period of 30 days in which to prepare a more detailed analysis of its objections. OFCCP categorically denied that request, reiterating that CNA had had an opportunity to object to disclosure under 41 CFR 60-60.4(d) and had not done so; that it had had numerous other opportunities to do so; and that no cause existed for a delay, particularly in view of the time requirements of the Freedom of Information Act. That same day, November 7, 1975, CNA filed a second suit in the United States District Court for the District of Columbia, *Continental Casualty* v. *Dunlop*, Civil Action 75-1836, also seeking to enjoin disclosure of the AAP.

A week after the second suit was filed, the ICS received a telegram from Women Employed stating that the organization had not yet determined whether it desired the entire AAP and asked to be given until December 14 to decide. For many months nothing further was heard from Women Employed. (See discussion below).

In view of the uncertainty as to whether Women Employed would press for the entire AAP because it did not for a substantial period of time indicate that it actually wished copies of the utilization analysis, the Gov-

ernment and CNA explored dismissal of the action. On April 7, 1977 CNA moved for, and obtained from Judge Corcoran, an Order of Voluntary Dismissal Without Prejudice and Imposing Terms and Conditions, providing that the Government would give CNA nine days notice prior to releasing any affirmative action plan or compliance review reports, that CNA would be given an opportunity to be heard by the Government, and that the court would retain jurisdiction to permit reinstatement of the action upon notice of an impending disclosure.

However, on April 29, 1977 Women Employed renewed its request to the HEW Insurance Compliance Staff for, among other documents, the 1974-75 Affirmative Action Program of Continental Casualty, and added to this a request for the AAP for CNA's 1976-77 Midwest Regional Life/Accident and Health Office in Chicago.

ICS, pursuant to agency policy and Judge Corcoran's April 15, 1977 Order, informed CNA's attorneys on May 5, 1977 that the request had been received. CNA then filed a third suit in the district court for the District of Columbia, *CNA Financial Corporation* v. *Marshall*, Civil No. 77-0808. According to the Complaint, Friedman had stated to the company's representative that in view of the fact that the Director of OFCCP had already heard the company's objections to disclosure, and had issued an administrative decision regarding them (the September 17, 1975 decision), the matter was administratively closed, and disclosure of both AAP's would be made to Women Employed consistent with OFCCP's decision.

On May 18, 1977 Judge Parker restrained until June 30, 1977 the release of "the plaintiff's 1974-75 and 1975-76 (sic) Affirmative Action Programs, EEO-1 Forms, Compliance Review Reports (and Corrective Action Programs and Conciliation Agreements)." The order also required CNA to file an index of a type described in *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir.1973) of all the documents

and recognized a dispute over the disclosability of the company's EEO-1 reports (which the government noted were required to be made available to the public by OFCCP under its rule at 41 CFR 60-40.4.). The Order provided that the parties must promptly brief their positions regarding disclosure of the EEO-1 reports with supporting affidavits. In the interim, the parties agreed to postpone a hearing on a preliminary injunction until after CNA exhausted its appeal rights regarding the second AAP within the Department of Labor (OFCCP). Then, while the agency decision was under advisement, the ICS received a letter from an organization called Women Organized for Employment which requested, pursuant to the Freedom of Information Act, the "most recent" EEO-1 reports for CNA Financial Corporation's Los Angeles, San Francisco and Orange County, California offices.[5]

On October 4, 1978, OFCCP issued a second decision which essentially affirmed its December 17, 1975 decision regarding the 1974-75 Corporate Home Office Affirmative Action Program, and held the 1976-77 Midwest Office AAP to be disclosable to a like extent (with like deletions of salary and wage and other information) and reiterated its statement that its regulations required EEO-1 reports to be disclosed.

CNA promptly moved the district court to amend the temporary restraining order (which had been extended) to restrain release of all of the company's EEO-1 reports. The court denied that motion, but stayed further proceedings in the case pending the Supreme Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), which potentially bore on many of the legal issues involved in the district

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[5] Apparently, however, and unbeknownst to the Department of Labor, ICS had advised Women Organized for Employment that ICS could not respond to the request and that it must be made directly of the OFCCP.

court action. CNA then applied to the Court of Appeals for a stay of disclosure of the EEO-1's which was issued on November 13, 1978.

The Supreme Court issued its decision in *Chrysler* on April 18, 1979, (441 U.S. 281) and shortly thereafter the Court of Appeals remanded the issues before it to the District Court with consent of the parties. On November 2, 1979 the District Court, again with consent of the parties, ordered that all issues in the case be remanded to the Office of Federal Contract Compliance Programs for a new administrative determination in accordance with its normal rules of practice in light of the Supreme Court's opinion in *Chrysler*.

Proceedings Before the Agency on the Remand.

As a first step in the remand, OFCCP queried both Women Employed and Women Organized for Employment to determine whether they continued to maintain an interest in the documents which they had originally sought. Women Employed responded in the affirmative; Women Organized for Employment did not.[6]

On January 4, 1980, CNA's attorneys requested OFCCP to provide them an evidentiary hearing at which they would be permitted to present expert testimony and examine persons on whom the government intended to rely in making a decision on the remand issues. By letter of February 15, 1980 the Department of Labor denied the request for the formal hearing, but on May 29, 1980 advised CNA that it would consider any written arguments and supporting documents submitted by CNA Financial Corporation as to why the records should not be disclosed.

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[6] The decision herein thus concerns the 1974-1975 AAP for the Continental Casualty Company Home Office; the 1976-77 AAP for the CNA Midwest Regional Office; the EEO-1 Reports for those facilities; and the HEW compliance review reports concerning them.

The Department of Labor provided CNA with a listing of all documents in its files which it believed contained CNA's assertions of harm relating to the issue of disclosure and requested CNA to identify any additional documents it wished to be considered and to submit them within thirty days. No response to this letter was ever received.

CNA's Legal Arguments

Based on CNA's pleadings in the several District Court actions described above, and previous arguments before the OFCCP, CNA advances several legal arguments why the OFCCP must withhold portions of the documents from public disclosure. First, it argues that the Freedom of Information Act is inapplicable to the documents pursuant to exemption 3 of the Act, 5 U.S.C. 552(b)(3), which recognizes certain categories of non-disclosure statutes. In its present form, exemption 3 applies to all matters:

> "specifically exempted from disclosure by statute * * * provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

The statutes which CNA asserts are applicable here are 18 U.S.C. 1905 (the Trade Secrets Act); 42 U.S.C. § 2000e-8(e) (§ 709(e) of the Civil Rights Act of 1964); and 44 U.S.C. § 3508.

We find that the Trade Secrets Act is not within the scope of exemption 3 for the following reasons. When Congress amended exemption 3 in 1976, it singled out Section 1905, stating that this section was excluded from the coverage of the exemption. The House Committee on Government Operations report on the amendment to exemption 3 explicitly commented on the proper relationship between 18 U.S.C. 1905 and the FOIA (H.R. Rep. No. 880, Part 1, 94th Cong., 2d Sess. at 23 (1976), *reprinted in* 1976

U.S. Code Cong. & Admin. News 2183, 2205):

> Under the amendment, the provision of the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *carte blanche* to withhold any information he pleases, would not come within Exemption 3. Similarly, the Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is "not authorized by law," *would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act*, since the disclosure is there authorized by law (emphasis added). Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information. See *Charles River Park "A", Inc.* v. *Dept. of Housing and Urban Development*, 519 F.2d 935, 941 n. 7 (D.C. Cir. 1975), and cases there cited.

The legislative history therefore, is clear that Section 1905 is not within exemption 3.

More recently in July 1978, the House Committee on Government Operations issued its Twenty-Fifth Report in which it reiterated the position that the Trade Secrets Act does not fall within exemption 3. The Committee noted in its report that prior to the amendment of exemption 3, some courts had incorrectly held that 18 U.S.C. 1905 was an exemption 3 statute; but the better view was that section 1905 was not such a statute, either before or after the amendment. The report read in part: "The committee has never considered that section 1905 qualified under exemption 3, and since the Sunshine Act only narrowed the scope of the exemption, *it is not possible for 1905 to qualify under*

the amended exemption." H.R. Rep. No. 1382, 95th Cong., 2d Sess. at 58 n. 211 (1978).

Numerous federal courts have adopted the approach of the House Committee on Government Operations and have found that Section 1905 does not qualify as an exemption 3 statute. The District of Columbia Circuit in particular has reached that conclusion several times. In *National Parks and Conservation Assn.* v. *Kleppe*, 547 F.2d 673 (D.C. Cir. 1976), the court first noted that it had also so held under the original version of exemption 3 in *Charles River Park, supra*, 519 F.2d at 941 fn. 7. The Court then stated that it still found 18 U.S.C. 1905 to be outside exemption 3 because, by its terms, Section 1905 "is a statute of general applicability and not one that specifically defines or categorizes the information to be exempted within the meaning of the third exemption (citations omitted)." *National Parks, supra*, 547 F.2d at 686. More recently, in *Goland* v. *CIA*, 607 F.2d 339, 350 fn. 61 (D.C. Cir. 1978), *cert. denied*, ___ U.S. ___, the court referred to House Report 880, Part 1 and found that statutes such as 18 U.S.C. 1905 were not intended to be included within exemption 3. The other courts which have faced this issue are virtually all in accord. *See, General Dynamics Corp.*, 607 F.2d at 236 (8th Cir. 1979); *United Technologies Corp.* v. *Marshall*, 464 F. Supp. 845 (D. Conn. 1979); *Westchester Gen. Hosp. v. HEW*, 464 F. Supp. 236 (M.D. Fla, 1979); *Nationwide Mutual Ins. Co.* v. *Friedman*, 451 F. Supp. 736 (D. Md. 1978); *Westinghouse Elec. Corp.* v. *Brown*, 443 F. Supp. 1225 (E.D. Va. 1977); *Crown Central Petroleum Corp.* v. *Kleppe*, 424 F. Supp. 744, 751-752 (D. Md. 1976); *Guerra* v. *Guajardo*, 466 F. Supp. 1046 (S.D. Texas 1978); *St. Mary's Hospital, Inc.* v. *Califano*, 462 F. Supp. 315 (S.D. Fla. 1978) *affd.*, 604 F.2d 407 (5th Cir. 1979).

We also reject CNA's contentions with respect to § 709

(e) of the Civil Rights Act and 44 U.S.C. 3508.[7] We find them to be inapposite to the disclosure question involved here. Section 709(e) is asserted by the company to preclude release to the public because the EEO-1 reports at issue happen also to be furnished to the Equal Employment Opportunity Commission. We find that section 709(e) expressly covers only the EEOC with respect to reports obtained pursuant to its statutory authority. That the identical forms happen to be required of Federal contractors and subcontractors under Executive Order 11246 and by the EEOC pursuant to its powers under § 709(c) does not make the prohibitions of §709(e) applicable to OFCCP. This issue has been examined repeatedly in the Federal Courts which, in consideration of the distinction in functions, powers, and limitations on the two agencies, have held § 709(e) inapplicable to OFCCP. *Sears, Roebuck & Co.* v. *GSA*, 509 F.2d 527 (D.C. Cir. 1974); *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976); *United Technologies Corp., Pratt & Whitney Aircraft Group* v. *Marshall*, 464 F. Supp. 845 (D. Conn. 1979). Moreover, under the rationales in those cases, 44 U.S.C. § 3508 is also not applicable because there has been no transfer of documents from EEOC to OFCCP. The EEO-1 Report is required to be filed under separate authorities of the two agencies. (*Cf. Reynolds Metals Co.* v. *Rumsfeld*, 564 F.2d (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978) in which the court emphasized statutory requirements that the two agencies cooperate in information collection and other activities.)

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[7] Section 709(e) prohibits the U.S. Equal Employment Opportunity Commission from making public information it obtains under the Civil Rights Act prior to the institution of a proceeding under the Act.

44 U.S.C. § 3508 concerns coordination of federal reporting services. It establishes conditions under which federal agencies are to furnish information to each other and provides that provisions of law applying to a transferring agency will also apply to the transferee agency.

The fact that the Trade Secrets Act is not within the scope of exemption 3, however, does not end our analysis. As noted in House Committee Report 95-1382, *supra*, once the question of whether an exemption 3 statute applies is answered in the negative, the agency must determine whether any other exemption in the FOIA is applicable. If none applies, then disclosure is mandated by the FOIA and the Trade Secrets Act is, by its terms, inapplicable because it proscribes disclosure only "to any extent not authorized by law."

Confidential Commercial Information in the Documents at Issue

Accordingly, the central focus of our inquiry is whether any portions of the documents at issue are within FOIA exemption 4. Once this question is answered, we view the portions of the material found to be outside the exemption as required to be disclosed under the FOIA, and the disclosure to be "authorized by law" within the meaning of § 1905.

In determining what, if any, portions of the materials fall within the (b)(4) exemption, we believe the appropriate test is that stated in *National Parks and Conservation Assn.* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974), under which commercial or financial information is covered by exemption 4 if it is likely to have either of the following effects:

1) to impair the Government's ability to obtain necessary information in the future; or

2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

In determining whether the documents, or any portion of them, fall within exemption 4, OFCCP has considered the arguments of CNA set forth in documents which were submitted over the five year history of this case to the

Insurance Compliance Staff of the Social Security Administration, the Department of Labor, or in litigation. (Exhibits "A" through "S".)[8]

Of particular importance in understanding CNA's objections to disclosure is Exhibit "Q". This four-volume document is captioned CNA's "Itemization, Index and Justification of Documents", and contains CNA's statement of reasons for withholding the documents at issue on a page-by-page basis.* The assertions and objections contained in it can be broken down into several main types of arguments, and they are keyed to several main types of information. Our analysis of these arguments, and our

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[8] A second group of Exhibits, designated as "T through "CC", are the actual documents whose disclosure is at issue. For ease of reference we will refer to the first set of Exhibits generally as "objections" and the second set as "documents at issue." The document at issue called the "CNA Midwest Regional Office 1976-1977 Affirmative Action Plan" is comprised of two main Volumes. Volume I, consisting of 103 pages, is the "base" document of the plan which consists of narrative information concerning the company and its affirmative action effort, with certain tables on various aspects of employment. Volume II is "utilization analysis", consisting of approximately 542 pages. CNA performed utilization analyses for its Midwest Regional Office for 15 organizational "units" and one "area". The utilization analysis for each unit or area contains the identical format of charts and narrative sections. The 1974-75 Continental Casualty Corporate Home Office Affirmative Action Plan is comprised of 80 volumes containing statistical information which are further broken down into "unit" volumes, 55 in number. The HEW Compliance Review Report on the CNA Midwest Regional Office is 110 pages and consists of narratives and statistics concerning CNA's affirmative action program and employment practices. The HEW Compliance Review Report on the Continental Casualty Home Office is contained in five separate binders comprising 767 pages.

* This is the *Vaughn* v. *Rosen*-type index which the District Court required CNA to file in No. 77-0808.

findings thereon, are as follows.

First, CNA asserts that "applicant flow" information contained in the Affirmative Action Program could be easily misconstrued by the public to show an apparent weakness in the Company's affirmative action profile even though this might be due to the scarcity of qualified individuals in the labor market. It is argued that this could result in adverse publicity and a consequent loss of customers. "Applicant flow" information is information which shows the number of persons of minority and nonminority racial groups (and the number of men and women) who apply for employment with a particular employer and the numbers of person hired from each applicant group.

We find CNA's argument to be without merit. First, its assertions about public reaction are purely speculative. If there is no concrete information in the public eye concerning the kinds of applicants that the company is attracting through affirmative action efforts, the public by definition can only speculate about "apparent weaknesses" in the company's employment patterns, to use the company's term. Our view is that disclosure of such information is actually more likely to foster appreciation of the company's level of effort in attracting a broad spectrum of applicants as it is to bring forth public criticism of its employment practices. However, even if the company could accurately predict misinterpretation of the information and adverse reaction from some elements of the public, we do not accept that such a reaction would constitute a substantial competitive injury within the meaning of the *National Parks* standard. Indeed, serious questions are presented as to whether arguments which seek to avoid public reaction can be considered under the FOIA. *See, Robles* v. *EPA*, 484 F.2d 843 (4th Cir. 1973).

CNA next argues that "applicants, particularly minorities and females, with knowledge of such information may erroneously believe that CNA does not provide

affirmative action opportunities and thus be reluctant to work for the company." (Itemization, Index, and Justification of Documents, Ex. Q, Book I, pp. 4-5.) Several factors lead us to reject this argument. We believe that the reasons stated above for rejecting such an assertion regarding disclosure to the general public also apply to this assertion. Further, applicants who understand that a company is making efforts to assure equal opportunity may in fact be encouraged to accept employment; obviously employers with a reputation for fairness and equality of treatment will attract good people most effectively. Indeed, the regulations require contractors to disseminate portions of the affirmative action programs both internally and externally. (41 CFR 60-2.21(a)(11) and 2.21(b)(4).) Second, a large portion of persons who apply for employment learn of opportunities through acquaintances who already work for the firm (this is particularly true of CNA in many job categories) and the latter are likely to have impressions of the company's attitudes and practices from the inside. This reinforces the need for dissemination of accurate, complete information about the affirmative action posture of the contractor.

A further aspect of CNA's argument on disclosure of applicant flow data is addressed to its relationship with its independent agents. CNA states:

> [I]ndependent agents or agencies could misconstrue such statistics in various ways: (a) Since such statistics reflect attrition rates and number of new employees, independent agents would be concerned about continued servicing of their accounts. Competent servicing of accounts is a major concern of independent agents and agencies; (b) Statistics regarding percentages of females and minorities hired may affect the prejudices of independent agents in various ways, consequently resulting in the decision of agents to cease or decrease the sale of CNA insurance policies. CNA "Itemization", Book I, at p. 5.

We are somewhat taken aback by this argument inasmuch as it assumes the "prejudices of its agents' regarding percentages of minorities and females hired." Cast in its best light, this must be meant to suggest that agents could be dissatisfied with the company's slowness in hiring capable minorities or women. The reason we say "best light" is that if the opposite were intended it would be an extremely cynical argument, akin to those long since rejected in employment discrimination law that "customer preferences" for employees of a particular race or sex justify exclusionary employment practices.[9] This would be a noxious notion that we think it best not to infer from the company's statement; we certainly will not assume it of the company's independent agents. Based on a more positive interpretation, we would conclude that agents' knowledge of the company's affirmative action efforts would only allay any concerns they may have about the company's employment practices. In addition, common sense indicates that a person's judgment about service is not based on what they anticipate but on what they get. Surely no one knows the quality of CNA's service better than the agents themselves; their day to day dealings with the company will tell them more about service than any remote inferences that they could draw from the applicant flow figures in the plan.

Continuing its argument about the applicant flow figures, the company states that "the company's government business would be terminated if it did not meet affirmative action goals." As with the preceding statement, we are somewhat undecided how to interpret this phrase. These figures already have been submitted to the Government; if what CNA fears is government sanctions, surely public review of the information cannot very well compound the problem. Further, we find that this suggestion

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[9] *See, Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir., 1971), *cert. den.* 404 U.S. 950; 29 CFR § 1604.2 (a)(1)(iii).

is pregnant with a fundamental misconception of the objective of affirmative action. The Executive Order does not require numerical parities or quotas, but rather directed (i.e. affirmative) effort focused on attracting the broadest possible group of qualified applicants (including existing employees when appropriate) to its tasks. Disclosure of the documents at issue to the public is irrelevant to the Government's determination of whether CNA's Executive Order obligations have been met.

The company further postulates other uses to which the applicant flow figures would assertedly be put by direct competitors:

> [The] Data specifically sets forth the education level, age, range, source of application and percentage of success in hiring in such categories. The information could aid a competitor viewing such information in directing its recruiting efforts to the most successful sources of potential employees, which would consequently save costs for the competitor in recruiting, and make it more difficult and costly for CNA to recruit.

We think that this argument confuses cause and effect to great extent. If an employer reaches out broadly to different recruitment sources the origins and characteristics of the persons who apply for employment will be determined to a substantial degree by general forces in the labor market. An employer can affect this to varying degrees by its exact recruitment methods, but the general recruitment experience of employers in similar labor markets is parallel. They are likely to encounter the same kinds of applicants when using the same fundamental kinds of job search methods. Whatever knowledge, if any, a competitor might gain from examining CNA's experience will largely duplicate its own experience. The categories of age, education level and other demographic characteristics are expected to be common across the range of employers in the same general line of business. This is a function of labor mar-

ket forces beyond an individual employer's control. In this connection it should be noted that in the applicant flow figures to which CNA refers the sources are extremely general, for example, "walk-in," "newspaper ad," "employee referral," "agency". These kinds of recruitment sources are surely no revelation to a competitor. Further, CNA's hiring criteria are not specified. A competitor would have no way of knowing the skills or caliber of an employee hired from a particular source or demographic group. In fact, the figures to which the company refers do not even specify what positions they have hired people into. They specify only the broadest possible groupings, "exempt" and "non-exempt". (These are common employment terms referring to an employee's status under the Fair Labor Standards Act.) In addition, as with most other information at issue, the recruitment data is dated. Whatever descriptive value it may have had in 1975 and 1976 has surely dissipated over the years.

The company also notes that some of the applicant flow figures reflect results of its internal job posting system. It maintains that an employee who views the results of this process "would be demoralized as a result of the small percentage of individuals promoted who applied for posted jobs." (CNA "Itemization," Book I, at p. 7.) We are reluctant to accept this general type of argument – and CNA makes a number of them – because the business of predicting how people react to such knowledge is inherently speculative. Reinforcing our skepticism is the fact that employees tend to know how quickly people advance within their employing organization, and tend to have an opinion as to whether an employer has biases for or against its own employees. Indeed, because CNA posts its job vacancies internally, employees have a means for evaluating their own chances for upward mobility and those of their co-workers simply by noting who got the job.

The company also asserts that "a corporate raider [out-

side recruiter], armed with such information, would persuade CNA employees to work for a competitor based on apparent limited mobility at CNA." *Id.* We are likewise unpersuaded by this because employees are likely to have the best estimate of their own potential in a job. While every person is likely to take stock of his or her advancement potential, increases in pay are at least as decisive in determining whether to take a new job.

In a series of assertions concerning CNA's relationship with its own employees, CNA expresses concern that the revelation of individual salary information would be a breach of privacy. The reasons stated are that this would be "extraordinarily embarrassing or painful to an individual or place an employee in an uncomfortable position with respect to other employees." The company explains that "the 5-digit salary grade designation would permit other employees to ascertain approximate salary." (Itemization, Book I, p. 3; Book I, Vol. II, p. 9). Finally, CNA argues that salary range information would aid a raider in hiring CNA employees. (Itemization, Book I, Vol. II, p. 9)

While we are inclined to agree to remove individual salary grade information on privacy grounds, several observations must be made. First, as noted in the Affidavit of Marcus Bogue, *infra*, insurance regulatory agencies already require CNA and other insurance companies to list all salaries of $30,000 or more. Second, what is set forth in the AAP is, most often, the salary *grade* of a particular *job* or set of jobs. The range of actual dollar salaries within the range is substantial.[10] Third, we do not believe that general salary range information should be sacrosanct in every such situation; in CNA's case, there are numerous instances where precise salary for an individual is given and we have decided to protect it (see attached Order).

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[10] We do not have any information as to whether incumbent employees know the grade level of their co-workers.

Fourth, we believe that outside recruiters are interested in identifying competent employees with particular skills or experience, and when they find them they have no special difficulty in finding out what they are paid because an employee who is interested in exploring other jobs will tell them.[11]

The next principal area of CNA's concern relates to its staffing information. Stated most simply, CNA argues that through the use of staffing figures which are set forth in the AAP's for each of its organizational and geographical units, a competitor would be able to observe changes in allocation of personnel and thereby deduce marketing and services changes – what the company calls "emphasis." (CNA "Itemization," Book I, p. 2) What must be said first and foremost about this argument is that the actual staffing information contained in both AAP's is from 1975 and 1976, information which is by now quite stale.[12] Second, significant amounts of information about the company's income from various sources are matters of public record. The insurance industry is subject to comprehensive and detailed regulation throughout the United States. Payments of dividends to CNA by its specialized subsidiaries and affiliates is subject to regulation by the State of Illinois and virtually all other states have established insurance supervisory agencies with broad administrative powers, including prescribing the form and content of statutory

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[11] However, in other cases, particularly in industrial settings, wage scales are not only known but are part of collective bargaining agreements or other guidelines which are known to workers.

[12] To resolve any doubts over the possible competitive use (and we have many) of projections of the workforce, we have removed long-range forecasts which appear at certain points in the materials. We believe, however, that such forecasts are apt to be based principally on general assumptions about general growth in business, estimates which any observer of capital markets knows are often likely to be wrong.

financial reports. (See CNA Financial Corporation 1980 Form 10-K, SEC File 1-5823, at 2). Although these reports do not contain future forecasts concerning the business performance of CNA and its subsidiaries, they do contain a quite substantial amount of information compiled on an annual basis, including the profitability of CNA's affiliated companies each of which tends to sell limited lines of CNA's products. (The overall product line of CNA includes property, casualty, life, accident and health insurance, annuity products and consumer finance). *Id.*, at 1. In addition, filings required by many states require that the salaries of all employees receiving in excess of $30,000 per year be listed, together with the salaries of officers and directors and certain other individuals. (Affidavit of Dr. Marcus Cook Bogue III, 6/29/77, at 4.) Further, information as to the number of employees in regional locations of the company is also publicly available from business reporting services such as Dunn and Bradstreet. Thus, much information about CNA's profitability, compensation practices, and regional workforce staff size is already in the public record. The question before us is whether the Affirmative Action Plan material listing numbers of employees would provide information of such incremental value as would cause a substantial injury to the company in terms of allowing competitors to monitor its activity and its "emphasis." We must conclude that the most a rival could gain from the staffing information (with expungements described in the accompanying order) is some vague, indefinite insight into the firm's priorities (as of 1975 and 1976) which would not be of significant competitive value.

In this regard, however, we have withheld salary level information, perhaps out of an excess of caution. Though some of the information which we have deleted is removed on the independent ground of preventing invasion of personal privacy, we are confident that without it, no significant competitive use could be made of the AAP data. As will be seen from the following order, we have expunged all

numerical job codes (and thus any reasonable estimate of compensation of company employees) which we believe will reduce insight a competitor could gain to the point where no significant competitive advantage could be obtained from the data.

Dated: 11/28/80

/s/ JOHN YUASA (Acting)

Director, Office of
Federal Contract
Compliance Programs
U.S. Department of Labor

IN THE UNITED STATES DEPARTMENT OF LABOR

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

In the Matter of the Disclosure of Documents Pertaining to CNA Financial Corporation } November 28, 1980

ORDER

In accordance with the foregoing it is hereby ordered that upon the vacating of all orders issued by the United States District Court for the District of Columbia in CNA Financial Corporation v. Marshall, Civil No. 77-0808, which restrain defendants from releasing certain documents, the following records of the U.S. Department of Labor, Office of Federal Contract Compliance, will be released to the public with deletions as indicated in the following. Portions of the documents not specifically described shall be released for the reason that their disclosure has not been contested by CNA Financial Corporation or the Continental Casualty Company.

1976-77 AFFIRMATIVE ACTION PLAN FOR THE CNA INSURANCE CO., MIDWEST REGIONAL OFFICE, 55 EAST JACKSON STREET, CHICAGO, ILL. [VOLUME I]

Section:	Extent of Disclosure and Comment
2. Current Business Environment	Release. Business projections are obsolete; gross sales projections obsolete; no possibility of competitive use of information during years in question.

3.	Current Organization	Release. Inferences about business emphasis and activity are indefinite and of no significant competitive use.
4.	Organizational Charge	Delete names of employees; [5 USC 552(b) (6)] delete 5-digit job code
6.	Manager's Commitment	Delete all individual names, p. 9 [5 U.S.C. 552(b) (6)]
12.	CNA Home Office Applicant Flow 1975 pp. 24-26	Release. General sources of employees are universally used and successful recruitment sources cannot be evaluated inasmuch as hiring criteria are not specified. Assertion that demoralization will occur if information on sources of hires is known is speculative.
A.	Table 1	Release. Although such information may reveal relative success of various sources of applicants and show intensity of competition for workers in specific age and education groups, information is essentially the same for all labor market competitors and will be reflected in all competitors' experience.
B.	Table 2	
C.	Table 3	
D.	Table 4	
E.	Table 5	

F.	Table 6	
G.	Table 7	
H.	Table 8	
I.	Table 9	
J.	Table 10	
K.	Table 11	
L.	Table 12	
M.	Table 13	
N.	Table 14	
13.	CNA Office Applicant Flow First Quarter, 1976, p. 41	Release. See item 12.
	A, p. 42	
	B, p. 43	
	C, p. 44	
	D, p. 45	
	E, p. 46	
15.	G. Salary Ranges p. 65	Withhold entire page. May reveal individual salary level [5 USC (b) (6)]
15.	H. Salary Increase Guidelines, p. 66	Release. Percentages are dated and data are relative. Asserted harm unlikely, insubstantial.
15.	I. Combine One-Grade Promotion pp. 67, 68, 69	Release. See above.
15.	J. Combined One-Grade Promotion pp. 67, 68, 69	Release. See above.
15.	K. Combined One-Grade Promotion pp. 67, 68, 69	Withhold all underscored pay grade figures on p. 70; release remainder. See above.

16.	Affirmative Action Monitor-of ing, pp. 71-754	Release with exception of grade headings. Inferences about business emphasis and activity are of low quality and of no significant competitive use.
19	Work Classification pp. 81-83	Delete all salary grade numerals and all numerals on "incidence" lines. Remaining information about business activity of low quality, no significant competitive use.
20.	Work Force Classification Analysis, p. 84	Release. Numerical information is general and numbers of employees are not specified.
21.	Hires-Midwest Region, p. 85	Release. Shows no salary grade information and does not reflect expansion or contraction as contractor argues, inasmuch as turnover is not shown.
22.	Promotion, p. 86	Release. Promotions dated and of no value.
23.	Terminations, p. 87	Release. Shows no individual terminations and reflects principally normal turnover.
24.	Transfers, p. 88	Release. Shows no individual transfers and does not indicate whether vacated positions were filled.
25.	Training Data, p. 89	Release. Shows no individual training information.

26.	Employment Goals pp. 90-98	Delete job grade figure at top left and all figures concerning years after 12-79. With no projections or salary information, data is of low quality, competitor cannot gauge resource allocation.
27.	New Hires/Promotions, pp. 99-100	Withhold numerals in left-hand column See # 21(b)(4)
28.	New Hires	Same as above.
29-300	EEO-1 Category p. 101 EEO-1, Report, p. 102-103	Release. Shows only aggregated staffing; no salary information. Information obsolete.

Volume II (AAP Utilization Analysis) 1976-1977

I. Unit: Midwest Regional V.P.

Section

1.	Unit & Subunit Function	Release. Information extremely general as to functions, forecasts, responsibilities.
2.	Organization Chart	Delete names of employees [(b) (6)]. Delete 5-digit job code. [(b)(4), (6)]
3.	Unit or Subunit Listing by Job Title	Delete 5-digit job code. With deletion of salary level, inferences about recourse allocation would be of low quality, no significant competitive use.
4.	Job Title Listing	Delete last paragraph. [(b) (6)]

5.	Lines of Progression, p. 109	Release. Company objection not relevant to data on this page.
6.	Incumbent Wage Analysis, p. 110	Withhold entire page. [(b) (6)]
7.	Incumbent Wage Analysis, p. 111	Release. General information of no competitive value.
8.	Training Data, p. 113	Withhold entire page. [(b) (6)]
	Aff. Action Achievements	Withhold
9.	New Hires, p. 114	Withhold entire page. [(b) (6)]
10.	New Hire Analysis, p. 116	Release. Gives no personal information.
11.	New Hire Analysis, p. 116	Withhold top paragraph. [(b) (6)]
12.	Terminations, p. 117	Withhold entire page. [(b) (6)]
13.	Terminations, p. 118	Withhold entire page. [(b) (6)]
14.	Terminations, p. 119	Release. Gives no personal information.
15.	Transfers, p. 120	Delete all information in columns captioned "New Job Code," "Old Job Code" and "Name OPT". Removes all wage information, indication of cost.
16.	Transfer, p. 121	Release. Of no competitive value.
17.	Transfer, p. 122	Release. Of no competitive value.

18.	Employment Goals, p. 123	Delete grade figures top left; delete all projections after 12/79. Removes all wage information, renders information unuseable.
19.	Employment Goals, p. 124	Delete job grade, top right. Removes all wage information.
20.	Employment Goals, p. 125	Delete as in 18.
21.	Employment Goals, p. 126	Delete as in 19.
22.	Employment Goals, p. 127	Delete as in 13.
23.	Employment Goals, p. 128	Delete as in 18.
24.	Employment Goals, p. 129	Delete as in 19.
25.	Employment Goals, p. 130	Delete as in 18.
26.	Employment Goals, p. 131	Delete as in 19.
27.	Employment Goals, p. 132	Delete all projections after 12/79. Removes future employment plans, renders information useless in terms of assessing personnel.

II. Unit: Midwest Regional Personnel

Section

1.	Unit & Subunit	Release. General information on functions, forecasts, and responsibilities.

2.	Organization Chart	Delete name, 5-digit job code. Removes all salary information.
3.	Unit Listing, p. 136	Delete unit head name, 5-digit code. See 2.
4.	Lines of Progression,	Delete job code see
5.	Incumbent, p. 138	Withhold entire page.
6.	Incumbent, p. 139	Release. See 5.
8.	Training Data, p. 141	Withhold entire page. [(b) (6)]
9.	Affirmative Action Achievements	Delete items 1,2,3. [(b) (6)]
10.	New Hires, p. 143	Delete entire page. [(b) (6)]
11.	New Hires, p. 144	Release. Gives no information on individuals.
12.	New Hires Analysis, p. 145	Release. Gives no information on individuals.
13.	Transfers, p. 146	Delete as in No. 15, previous page.
14.	Transfers, p. 147	Release. See No. 12.
15.	Transfers, p. 148	Release; obsolete.
16.	Employment Goals, p. 149	Delete job grade figures, all projections after 12/79. Removes all wage level information, indications of future employment plans.
17.	Employment Goals, p. 150	Delete job-grade numerals. Delete all wage level information.
18.	Employment Goals, p. 151	Delete as in #16.
19.	Employment Goals, p. 152	Delete as in #16.

20.	Employment Goals, p. 153	Delete as in #17.
21.	Employment Goals, p. 154	Delete as in #16.

III. Unit: Midwest Region Life/Health

Section

1.	Unit & Subunit, p. 155	Delete name. [(b) (6)]
2.	Organization Chart	Delete two-digit salary code. Remove all wage level information, renders information competitively unuseable.
3.	Unit Listing	Delete 5-digit job code, unit head name. Removes employee identification, wage level information.
4.	Job Title	Release. Information of no value.
5.	Lines of Progression, pp. 160-162 Charts I, II, III	Delete 5-digit job code. See 2.
6.	Wage Analysis, p. 163	Delete entire page.
7.	Wage Analysis, p. 164	Release. Contains no useable information.
9.	Training Data, p. 166	Withhold entire page [(b) (6)]
10.	Affirmative Action Achievements	Delete employee names. Contains no useable information.
11.	New Hires	Delete name. [(b) (6)]
12.	New Hires, p. 169	Delete job code, name. [(b) (6)]

13.	New Hires, Analysis, p. 170	Release.
14.	Terminations	Withhold entire page. [(b) (6)]
15.	Terminations, p. 172	Release. Contains no personal or useable information.
16.	Terminations, p. 173	Release. Contains no personal or useable information.
17.	Transfers, p. 174	Delete 5-digit job code, name. [(b) (6)]
18.	Transfers, p. 175	Release. Contains no personal or useable information.
19.	Transfers, p. 176	Release. See 18.
20.	Promotions, p. 177	Delete as in #17. See 17.
21.	Promotions, p. 178	Release. See 18.
22.	Promotions, p. 179	Release. See 18.
23-34	Employer Form G	Delete grade numeral, top left, and projections after 12/79.
	pp. 180-191	See statement concerning Form G, above.
	Form G-1, pp. 180-191	Delete job grade figure. See statements concerning Form G-1, above.

IV. Unit: Regional Services Area

Section		
1.	Explanation of Mission p. 193	Release. General information of no competitive value.
2.	Statement of Area Problems	Manpower utilization data are general, and no significant value in estimating cost or productivity. Anticipated adverse publicity is speculative and harm asserted is insubstantial. Demoralization argument is speculative.
3.	Statement of Area Problems	Release. See 2.
4.	Work Force Classification	Delete salary grades, numerals on "incidence" line. Remove salary level information.
5.	Training data, p. 200	Remove names. [(b) (6)] No useable information.
6-9.	New Hires, Terminations, Transfers, Promotions	Delete names. [(b) (6)] No useable information.
10-17.	Employment Goals, pp. 205-212	Remove wage grades, top left. See explanation concerning form G above.

V. Unit: Services Management

Section		
1.	Unit & Subunit function	Release. See 1 above.

2.	Organization Chart	Delete two-digit salary code. Remainder of no significant competitive use.
3.	Unit Listing, pp. 216-218	Delete job code. See 2.
4.	Job Title Listing, p. 219	Release. No useable information.
5.	Lines of Progression, p. 220	Remove 5-digit job code. No usable information.
6.	Incumbent Wage Analysis	Withhold entire page. (b) (6)
7.	Incumbent Wage Analysis,	Release. No useable information.
9.	New Hires, p. 224	Withhold entire page. [(b
10.	New Hires Analysis, p. 225	Release. No useable information.
11-13	Transfers, p. 226-228	Withhold pages 225, 226
14-21	Employment Goals Form G p. 229 Form G2, p. 230 Form G, p. 231 Form G, p. 232 Form G2, p. 233 Form G, p. 234 Form G2, p. 235 Form G, p. 236	See holding concerning Form G, *supra*
22.	New Hires/Promotions, pp. 237-238	Delete salary grade, column 1. Remainder contains no competitively useable information.

VI. Unit: Personal Lines Underwriting

Section		
1.	Unit & Subunit Function,	Release. No useable information; obsolete.
2.	Organization Chart	Delete salary grade and No useable information.
3.	Unit Listing by Job Title p. 243	See holding concerning same document in Units I-IV, *supra*.
4.	Job Title Listing, p. 244	Release. See Unit V, Item 5.
5.	Line of Progression, p. 245	Remove code. See Unit V, Item 5.
6.	Incumbent Wage, p. 246	Withhold entire page. [(b)
7.	Incumbent Wage Analysis, p. 247.	Release. No useable information.
9.	Training data, p. 249	Withhold entire page. (b) (6)
10.	AAA, p. 250	Release. No significant competitive value.
11.	New Hires	Withhold entire page. [(b) (6)]
12.	New Hires Analysis, p. 252	Release. No personal information.
13.	Transfers	Delete name. No competitive value.
14.	Transfers, p. 254	Release. No competitive value.
15.	Promotions, p. 255	Withhold. [(b) (6)]
16-17.	Promotions, p. 256-57	Release. No competitive value.

18-27	Employment Goal Form G, p. 258 Form G, p. 261 Form G, p. 262 Form G, p. 265 Form G, p. 267 Form G1, p. 259 Form G2, p. 260 Form G1, p. 263 Form G2, p. 264 Form G1, p. 266	See holdings on forms G, G1, G2, *supra.*
28-29	New Hires/Promotions Summary, pp. 268-69	See holdings on New Hires/Promotions, *supra.*

UNITS VII THROUGH XVI, PAGES 270-646, CONTAIN FORMATS IDENTICAL TO THOSE IN THE PRECEDING SIX OPERATING UNITS. INFORMATION FOR UNITS VII-XVI WILL BE WITHHELD IN THE SAME MANNER AS IN THE COUNTERPARTS ABOVE.

1974-75 UTILIZATION ANALYSIS, AFFIRMATIVE ACTION PLAN FOR CONTINENTAL CASUALTY COMPANY HOME OFFICE

Area 1: Casualty Group Executive Staff

AREA SUMMARY

Section

1,3	Employment Goals, Form A-A-3, clerical Form A-A-4, above clerical	Release. No wage information is given and projections are obsolete.
2,4	Narrative Analysis	Release. Information is dated, of no value in assessing current employment levels.

5.	Summary of Affirmative Action Opportunities (A-C/1) Additions	Delete job codes, left column. Remaining information cannot be used to assess current employment levels or cost of unit operations.
6.	Utilization Analysis Explanation of Mission (form A-F) p. 1	Release. Contains no competitively useable information.
7.	Utilization Analysis-Unit Problems (Unit A-F) p. 2	Release. Same as above.
8.	Utilization Analysis Area Problems (form A-F) p. 3	Release. Same as above.
9.	Utilization Analysis-Area Problems	Release. Same as above.

Section

1.	Charts	Withhold. Contains names and salary level.
2.	CAMD	Withhold. See above.
3.	Marketing	Delete names [(b) (6)]
4.	MCMO	Withhold.
4.	(1), (2)	Withhold. See Item 1.
5.	CCC	Withhold. See Item 1.
6.	Combined	Delete salary level, left-hand column; remainder contains no competitively useful information.
7.	Claim Combined	Same as above
8.	Great Lakes	Same as above
9.	Chart	Delete names [(b) (6)]
10.	Blanchard	Delete names [(b) (6)]

11.	Data Systems	Delete names [(b) (6)]
12.	Chart	Release. No competitively useable information.
12.	p. 41	Delete figures in "Job" Column. See 6.
13.	p. 42	Delete figures in "Job" Column. See 6.
14.	(1) Chart	Delete names, job codes. names. [(b) (6)]
15.	(1) Charts (2) Names	Delete names, job codes. [(b) (6)]
16-18.	(1) Charts (2) Names	Delete names, job codes. [(b) (6)]
19.	Chart & all pages	Delete names, job codes. [(b) (6)]
20-21.	Rappoport and Parker and attachments	Delete names, job codes. [(b) (4)]
22-28.		Delete names, job codes. [(b) (4)]

UNIT SUMMARY

Section

10.	Title Page & Narrative	Release. Information of no competitive value.
11.	Executive Staff Analysis	Release. Information of no competitive value.
12.	Names & Job Titles	Delete names [5 U.S.C. 552 (b) (6)]
13.	Population Parity Clerical	Release. Information of no competitive value on "modeling" theory or raiding theory. No individual names given.

14.	Population Parity above clerical	Release. Same as above.
15.	Analysis for Clerical & Above	Release. Same as above.
16.	Unit Listing by Job Title Projections obsolete	Delete numerals in Job Code column. Remainder of no competitive value.
17.	Problem Area	Release. Information of no competitive value.
18.	Narrative Analysis	Release. Information of no competitive value.
19.	Problem Areas	Release. See 17.
20.	Promotions	Withhold all except columns CM through AF.
21.	Narrative Analysis	Delete individual name. Remainder of no competitive value.
22.	Problem Areas	Same as 21.
23.	Unit New Hires Listing	Same as 20.
24.	Analysis	Same as 21.
25.	Incumbent Wage Analysis	Same as 20.
26.	Job Code **NO7	Withhold. (b) (6)
27.	Employment Goals (A-1)	Delete job grade figure.
28.	Goal Summary (6)	Delete job grade cluster numerals and two-digit number in center of page. Remainder of no competitive value.
29.	Goals Summary (6/1)	Same as 28.

30.	Employment Goals (A-1)	Same as 27.
31.	Goal Summary (C/1)	Same as 28.
32.	Goal Summary (C/2)	Same as 28.
33.	Employment Goals (A-1)	Same as 27.
34.	Goal Summary (C)	Same as 28.
35.	Goal Summary (C/1)	Same as 35.
36.	Employment Goals (A-2)	Delete job grades
37.	Goal Summary (C)	Same as 28.
38.	Employment Goals (A-2)	Delete job grades. Same as 28.
39.	Goal Summary (c)	Delete job grades. Same as 28.
40.	Goal Summary (C/1)	Delete job grades. Same as 28.
41.	New Hires/Promotions	Delete job grades. Same as 28.

BOOK III

U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (INSURANCE COMPLIANCE STAFF) COMPLIANCE REVIEW REPORT FOR CNA INSURANCE COMPANY, MIDWEST REGIONAL OFFICE, 1976-77

Section		
1.	Deficiencies	Release. Contains no appreciable amount of data furnished by company.
Table Q		Release. Contains aggregate staffing information. Unuseable by competitor; obsolete.
3.	AAP Evaluation	Release. See 2.
4.	EEO-Current Composition & Distribution of Work Force, p. 12	Delete job codes in left-hand column. Remainder contains only aggregate staffing levels of no competitive value.
	EEO Problem Areas Offsite Review, pp. 13-16	Delete information on grade level, pages "3", "3A", "3B", "3C".
	Problem Areas-Onsite Review, pp. 17-18	Release. See 2.
	Projected Breakout p. 19	Release. Aggregate staffing data of no competitive value; obsolete.
	Questions that Need to be Addressed, pp. 20-21	Release. See 2.
	Analysis of Adverse Effect pp. 22-28	Release. Contains only aggregate staffing data of no competitive value.

5.	SCRR, pp. 31-39 Part A	Release. See 2.
6.	SCRR, pp. 40-55, Part B	Release. No company furnished data contained in report; personnel practices described are of a general nature and of no competitive value.
7.	AAP-Houston Branch	The Houston Branch AAP is found not to be an enclosure to the Midwest AAP; not subject to any request. No findings are made as to its releasability to the public.
9.	Contact Reports pp. 57-58	Release. No employment data. Information is of no significant competitive use.
	Correspondence from Harrington to Cramer dated 3-14-77, pp. 59-62	Release. Information of no competitive value.
10.	Correspondence from Lutterback to Harrington pp. 68-84	Delete portions of attachments to letter (p. 1, except para. 1-2; p. 2; employee data listings, p. 3; para. "D", p. 4; charts, p. 5; page 6; names and grades, para. "J", names para. "K", p. 7; entire page 8.
11.	Correspondence from Lutterback to Harrington dated Nov. 30, 1976, pp. 85-107	Delete names, grade level information pp. 85-107.

12. Correspondence from Lutterback to Friedman, Sept. 16, 1976, pp. 109-110	Release.
13. AAP	See portions of order above pertaining to Area and Unit Utilization Analyses

BOOK IV

U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (INSURANCE COMPLIANCE STAFF) COMPLIANCE REVIEW REPORT FOR CONTINENTAL CASUALTY COMPANY. 1974-75

Volume I

Section

3. Deficiencies	Release. Information is of no competitive use with respect to estimating cost, productivity.
4. Statement:	Release. No competitively useable information.
5. Table Q	Release. Contains only aggregate staffing information; of no value to competitors. Obsolete.
6-11. AAP, etc.	Release. Information is general and of no significant competitive value.
18. EEO-1's	Release. No competitively valuable information; obsolete; no salary level information.
19-22. EEO-1's	Release. Same as above.
24-25. Chronology	Release.

Letter for CNA to E.M. Friedman, 2/13/75, pp. 74-79	Release. No objection.
Continental Casualty Consolidated EEO-1 Information	Release. See 18 above.

Volume II

Section

14(2) Current Composition pp. 46-47	Release. Contains no wage level information. Data is of no competitive value, obsolete.
14(3) Problem	Release. [No (b) (4) claim]
15. Tables 1-12, 29-40	Release. No wage level information. Information obsolete as of 1972.
Tables 13-28	
16-18. LPS, SCSD	Release. See Vol.
22. Composition	Release, except for individual names and grade levels. Contains no wage level information
23. Charts 1-4	Delete names [(b) (6)]
24. Charts, pp. 132-52	Delete names [(b) (6)]
25. Home Office	Delete names [(b) (6)]

Volume III

Section

2. Discrimination	Withhold entire page captioned "Resolved discrimination charges". [(b) (6)]

3.	Active Discrimination	Withhold entire page captioned "Active Discrimination Charges."
4.	Flow Chart	Release. Sources of employees common. Successful recruitment not capable of being evaluated because hiring criteria not specified
5.	Applicant	Release. See above.
6.	Souce	Release. See above
7.	Employment	Release. See above.
8.	Report	Release. No competitively useable information
9.	Exempt	Release. See above.
10.	Sources	Release. See above.
11.	Fee, pp. 18-29	Release. See above.
26.	Memo	Release. See above.
30.	Memo & (1), (2), (3), (4)	Release. Same as above.
31.	Memo	Delete individual names following Memo of 8/1/74
31.	pp. 122-234	Release. See Vol 1, sec. 3.
32.	Memo & pp. 135-40	Release. See Vol 1, sec. 3.
36.	Special Work	Release. See Vol 1, sec. 3.

Section

1.	Charts	Withhold. Contains names and salary level.
2.	CAMD	Withhold. See above.
3.	Marketing	Delete names [(b) (6)]

4.	MCMC	Withhold.
4.	(1), (2)	Withhold. See Item 1.
5.	CCC	Withhold. See Item 1.
6.	Combined	Delete salary level, left-hand column; remainder contains no competitively useful information.
7.	Claim Combined	Same as above.
8.	Great Lakes	Same as above.
9.	Chart	Delete names. [(b) (6)]
10.	Blanchard	Delete names. [(b) (6)]
11.	Data Systems	Delete name. [(b) (6)]
12.	Chart	Release. No competitively useable information.
12.	p. 41	Delete figures in "Job" Column. See 6.
13.	p. 42	Delete figures in "Job" Column. See 6.
14.	(1) Chart	Delete names, job codes. names. [(b) (6)]
15.	(1) Chart (2) Names	Delete names, job codes. [(b) (6)]
16-18.	(1) Charts (2) Names	Delete names, job codes. [(b) (6)]
19.	Chart & all pages	Delete names, job codes. [(b) (6)]
20-21.	Rappoport and Parker and attachments	Delete names, job codes. [(b) (4)]
22-28.		Delete names, job codes. [(b) (4)]
29.	Gilmore, p. 110	Delete names, job codes. [(b) (6)]

30-34. Release charts but codes (see 14(2)).	Delete names, job codes. [(b) (6)]
35. Robertson	Delete names, job codes. [(b) (6)]
35. (1) & (2)	Delete Names, job codes. [(b) (6)]
36-37. Medicare Charts	Delete names, job codes. [(b) (6)]
38-39. PMD & TCC	Delete names, job codes. [(b) (6)]
40. Management	Delete entire page. [(b) (6)]
40. Chart	Delete names. [(b) (6)]
40. Chart & pp. 164-174	Delete names, job codes. [(b) (6)]

SO ORDERED:

Dated: 11/28/80

/s/ JOHN YUASA (Acting)

Director, Office of
Federal Contract
Compliance Programs
U.S. Department of Labor

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CNA FINANCIAL CORPORATION, et al.,
Plaintiffs,

v.

RAYMOND J. DONOVAN, et al.,
Defendants.

Civil Action No. 77-0808

FILED
MAY 29 1981

ORDER

Three motions are before the Court in this "reverse-FOIA" action to block disclosure under the Freedom of Information Act (FOIA) of affirmative action plan materials of plaintiff CNA Financial Corporation (CNA) in the possession of the Office of Federal Contract Compliance Programs (OFCCP). CNA moves to compel defendants to include in the administrative record two advisory reports prepared by consulting economist Professor Boyd Fjelstad to assist the OFCCP in reaching its November 1980 decision to order partial disclosure of the documents in question. Defendants have filed a cross motion for a protective order, asserting that the government privilege against disclosure of deliberative materials of agency decisionmakers applies to these reports. Plaintiffs also move to complete the administrative record by including three depositions taken at an earlier stage of this proceeding before the Social Security Administration.

The Court has considered all three motions and concludes that the reports by consultant Fjelstad are privileged from disclosure and that the depositions should be included in the administrative record. Because the agency claims it did not consider these depositions in its decision, the case is remanded to the agency once again to conduct that review.

The governmental privilege protects materials reflecting recommendations, advisory opinions and deliberations among agency decisionmakers generated in determining the agency's law or working out its policy. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-53 (1975). CNA argues that Professor Fjelstad's reports are not deliberative materials; rather, they contain a compilation of evidence provided to the agency for use in reaching its decisions. This evidence, it claims, is part of the administrative record that must be available for the Court to conduct a complete review of the agency's decision.

The OFCCP was ordered to submit these reports for *in camera* inspection, along with an explanatory affidavit, in order to enable the Court to evaluate the parties' claims. A review of the reports and the affidavit by Kenneth G. Patton, acting director of the OFCCP, demonstrates that CNA's characterization of the reports is incorrect. Both reports contain document-by-document recommendations to the agency as to how it should act on CNA's claims that disclosure would lead to competitive harm. These recommendations were a part of the agency give-and-take by which its final determination was made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C.Cir. 1975). In addition, the circumstances surrounding the creation of these reports buttress the conclusion that they are deliberative materials. As the Patton affidavit points out, Professor Fjelstad was employed to evaluate and discuss with OFCCP officials CNA's claim that release of affirmative action materials will lead to competitive harm. This was necessitated by the need to engage someone with economic training for advice and the unavailability of Labor Department economists for this task. Both prior to and following receipt of the initial report, OFCCP officials consulted extensively with Professor Fjelstad, examining various theories on which to base the agency's final determination. This process by which the reports were compiled supports the claim that Professor Fjelstad was engaged as an agency decisionmaker. His

reports reflect the "process of working out [the OFCCP's] policy and determining what its law should be. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 153.

CNA also asserts that even if the executive privilege is applied, it must yield in this case because of the central importance of the reports to this litigation. However, this argument incorrectly presumes that the agency's deliberations should be revealed for the plaintiffs to attack and for the Court to review. The OFCCP's final report provides the agency's rationale for its decisions; this is all CNA requires to fully and fairly challenge the agency's determination.

CNA also seeks inclusion of the depositions of George Reichert, a vice president of CNA Insurance Company, and experts Joseph Johnson and Dr. Marcus Cook Bogue III in the administrative record. These depositions were taken at the behest of the government in the initial administrative proceeding before the Social Security Administration. CNA argues that the OFCCP either refuses to acknowledge its consideration of this testimony, or that it wrongfully failed to review these materials in reaching its November 1980 decision. The agency responds that CNA was given an opportunity to designate these depositions for the agency's review but failed to do so. Therefore, it claims, CNA cannot belatedly urge their inclusion in the administrative record.

CNA legitimately expected that the testimony of these witnesses would be considered by the OFCCP on remand. The OFCCP's May 23, 1980 letter to plaintiffs' counsel, inviting CNA to submit any materials for consideration by the agency, stated that all materials previously supplied by CNA would be reviewed. A list of these materials was included in the letter. It was reasonable to assume on the basis of this letter that all materials generated by the government in the earlier proceedings would also be considered by the OFCCP. Since these depositions were among those government materials, CNA should not now

be penalized, and the completeness of the OFCCP's proceeding jeopardized, by permitting defendants to proceed without including and considering these depositions.

The OFCCP alleges that these depositions were not considered in its November 1980 decision. Therefore, the proceeding should be remanded to the agency once again to reevaluate its decision in light of this supplement to the administrative record. To do otherwise would place the Court in the position of reviewing the sufficiency of an administrative determination on the basis of evidence not considered by the agency, in contravention of basic principles of administrative review. *See Environmental Defense Fund v. Costle,* No. 79-2432, slip op. at 17-22 (D.C.Cir., April 21, 1981).

In accordance with the foregoing, it is this 29th day of May, 1981,

ORDERED that defendants' motion for a protective order is granted, and plaintiffs' motion to compel is denied; and it is

FURTHER ORDERED that plaintiffs' motion to include the depositions of George Reichert, Joseph Johnson and Dr. Marcus Cook Bogue III in the administrative record is granted. This proceeding is remanded to the Office of Federal Contract Compliance Programs for reevaluation in light of the addition of these depositions to the administrative record. A supplemental report shall be submitted to the Court by July 1, 1981.

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

U. S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

In the Matter of Documents Pertaining to CNA Financial Corporation } July 17, 1981

Supplemental Decision

On November 28, 1980, a Decision and Order were issued in this matter which concern the availability to the public of certain agency records and files pertaining to compliance by CNA Financial Corporation with the equal employment opportunity requirements of Executive Order 11246, as amended. The earlier decision, made on the basis of objections to disclosure filed by CNA Financial Corporation (hereinafter "CNA" or "the company") in the form of letters briefs, indexes, and affidavits, held that certain portions of the documents would be withheld from the public in that they fall within exemptions to the Freedom of Information Act, 5 U.S.C. 552(b). Other portions, however, were found to be not so exempt and, for that reason, available to the members of the public who had requested them.

An exact description of the documents at issue, the portions found exempt and non-exempt, and the reasons for those findings may be found in our earlier decision. As a general matter, however, the documents at issue consisted of two written Affirmative Action Programs prepared by CNA during 1975, and certain "compliance review reports" thereon prepared by the Government. The portions withheld consisted of information on individual salaries; names of employees; future workforce projections; and information on the performance or promotability of employees. The portions disclosed consisted of workforce statistics for various CNA operating departments by race and sex; goals

developed for equal employment purposes; and narratives concerning the CNA offices and units listed in the plans.

On May 29, 1981, the United States District Court for the District of Columbia (Parker, J.), sitting in an action for judicial review of the agency decision, *CNA Financial Corporation* v. *Donovan*, Civil No. 77-0808, ordered that the decision be remanded to the Office of Federal Contract Compliance Programs for consideration of three additional depositions taken in March, 1977. Those depositions – of George Reichert, Joseph Johnson, and Marcus Cook Bogue – had not been considered by the agency in connection with its November 28, 1980 Decision because they were not identified by CNA as documents it wished be to considered, notwithstanding its opportunity to do so.

Having reviewed the contents of the three depositions in light of the record reviewed already by this office, we affirm the decision and order of November 28, 1980, supplemented as follows.

The deposition testimony of Dr. Marcus Cook Bogue III adds little of substance to the affidavit made by him (and considered by us) in connection with our earlier proceedings. (See, Exhibit "I", Administrative Record). While Dr. Bogue's earlier affidavit set forth in expository fashion his opinions concerning potential competitive harm to the company on release of the documents at issue, his deposition (which was taken at the instance of government attorneys preparatory to litigation) concerns only the nature of his activities in preparing his statement by affidavit. His deposition contains details concerning the dates on which he met with company officials, the individuals with whom he spoke, and the identity of company records he examined. He also described the identity of information concerning CNA in published sources which he had examined, the general subject matter of his discussions with company officials, and the role which the company's attorneys played in the preparation of his affidavit. Nothing in this deposition

sheds any significant new light on the points set forth in his affidavit. In fact, some of the statements Dr. Bogue makes in his deposition tend to contradict theories of competitive harm asserted elsewhere. In discussing, for example, the affirmative action plans of companies besides CNA which he had examined, Bogue was asked whether he had seen portions of any company's affirmative action plans which would be "innocuous" if released. In response he gave his opinion that employment statistics which contained "nothing beyond the EEO-1 filing" would *not* cause competitive injury. (Tr. pp. 73-74). While this was intended to distinguish AAP's with broad levels of detail (like the nine broad occupational categories included in EEO-1 reports) from those containing finer levels of employment data, the substance of the remark concedes that some statistics showing current levels of employment in aggregate occupational categories cannot be considered to be competitively useful. Further, his testimony points to an apparent discrepancy between what the company considers "confidential" (data which it would not normally disclose to members of the public on request) from what is confidential in the sense of not being available to the public from any source. Thus, in discussing the information containing higher-level management salaries, Dr. Bogue revealed that what the company considers confidential vis-a-vis the public, or its own employees, it recognizes may be available from other sources, such as state insurance commissions (Tr. 50-51). This confirms our view that confidential treatment of particular information by the company does not mean it is unavailable from public sources. We conclude that the fact that the company considers certain information "company confidential" does not mean that the company vouchsafes that information from all other sources – including sources who intend to make it public. Further, we cannot credit Dr. Bogue's testimony with establishing that statistical information in the AAP, which is six years old, is objectively "confidential" in the form in which it is proposed to be released. (*See*, Decision of November 28,

1980, at 28-31.).

The testimony of Joseph Johnson, the second deponent, concerns the possible use of affirmative action plans by personnel recruiters. Johnson is employed by Hyde Park Employment, an employment agency which considers itself "minority specialists." (Tr., 3). Johnson testified that he performed recruiting services for CNA, Safeco, Allstate and Blue Cross/Blue Shield (Tr. 36-37). It was his opinion that information on the number of minority employees would be useful to a recruiter because it would indicate the presence of minority or female employees from which to recruit (Tr. 19). However, when asked whether the information would be useful with the names of employees removed, Johnson conceded that he would have to go about finding the individual minority or female employee by other means. Examples he gave of such methods included calling up the company and asking for the "black accountant in cost accounting", pretending that the name had been forgotten (Tr. 46). As Mr. Johnson himself emphasized, companies often direct their employees not to give information and advice over the telephone to unidentified callers. According to him, this is especially so when an inquiry concerns blacks or other minority workers (Tr. 45). He testified of his opinion that "it has been known in the black environment for companies to call the black employee and attempt to solicit them, to test their credibility," without referral through personal contacts (Tr. 33). These claims of competitive harm through "raiding" are tenuous and illogical in our view, and in any event, we are unconvinced that dated statistical information of the type involved here would materially advance the cause of personnel recruiters. Perhaps the best indication that this is so is the fact that while Johnson claimed that the document would be of great use to him, he had never asked for one (Tr. 34). Discussions with former employees of a firm would probably yield much better and more contemporary information about company personnel; finding out

about a firm's staff through its affirmative action programs would simply be indirect, expensive, and illogical. It would perhaps be more productive to stand at the office door at closing time.

The deposition of George Reichert, like that of Dr. Bogue, adds little to his earlier affidavit (Administrative Record, Exhibit "H"). Reichert, a Vice-President for Personnel for the CNA insurance companies, formerly worked in the personnel field for the Allstate Insurance Company among other firms. The substantive portions of his deposition concern methods used by CNA for the recruitment of personnel, including the fact that the company in some circumstances places orders with employment agencies for "controlled hire" recruitment. That is, the company seeks to fill a position with affirmative action goals in mind. He revealed that the company sometimes places orders with employment agencies with "priorities" for females and minorities (Tr. 19). He testified that CNA expends substantial efforts in recruiting minority and female employees and does not wish to lose them. Allusions are made in his testimony to possible competitive harm by injury to the public image of the company by public misconstruction of the reports (Tr. 91), and to possible use by competitors to raid employees (Tr. 73). These theories, however, were espoused in his affidavit, and we considered and rejected them earlier. We find them no more convincing now than before. First, the sheer volume of the documents at issue, not to mention their contents, reveal a substantial effort by CNA to advance equal employment opportunity goals. Any information about individuals or firms may be misinterpreted by the public, but that is a problem to which all facts are susceptible; withholding information solely on such a basis would expand the commercial confidentiality exemption of the FOIA to shield virtually all information concerning commercial entities. Reichert's argument that disclosure of the documents at issue would lead to increased loss of employees we find

similarly unconvincing. His testimony lends no weight to the similar assertions made before us earlier, and in some respects undercuts them. Reichert testified that considerable turnover occurs in the insurance industry. He stated that turnover of underwriters, for example, has run as high as fifty percent in some years (Tr. 52). Since the documents in question here concern CNA's employment compliment in 1975, its workforce is virtually certain to have turned over to a substantial degree. Past employment information should be practically insignificant to employment recruiters.

A final development deserves mention here. Subsequent to the District court's May 29, 1981, order of remand, CNA filed additional legal pleadings before this office dated June 17 and June 26, 1981. With those pleadings were included four new affidavits which the company now requests that we consider. In view of limited purpose of the court's remand to us, which was to consider the three affidavits described in the court order, we find further reopening of the record unwarranted. However, stopping short of including the four new affidavits in the record (the affidavits were executed by David P. Rutenberg, Philip L. Engel, Patricia M. Higgins, and John R. Hinrichs) we offer the view, having examined and analyzed them, that their contents would not alter our view as to which portions of the documents at issue must be disclosed pursuant to the Freedom of Information Act. For the forgoing reasons, we hold that the order of November 28, 1980 shall remain unchanged in any respect. Our order of November 28, 1980, will be given effect at such time as the extant judicial orders restraining release of the information at issue are dissolved.

Dated: July 17, 1981

/s/ ELLEN M. SHONG
Ellen M. Shong
Director, Office of Federal Contract
Compliance Programs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CNA FINANCIAL CORPORATION, et al.,
Plaintiffs,

v.

JAMES DONOVAN, et al.,
Defendants.

Civil Action No. 77-0808

FILED
October 29, 1981

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

This is one of many "reverse FOIA" suits* that have passed through the federal courts in recent years. Plaintiffs, CNA Financial Corporation and two of its subsidiaries (CNA), instituted this action on May 13, 1977 to enjoin release of certain affirmative action program materials provided to the government in compliance with Executive Order 11246. The Order related to the guarantee of equal employment opportunity by corporations benefiting from government contracts. The Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor, which administers the Executive Order, indicated its intention to release the material pursuant to a request by an organization, Women Employed, under the Freedom of Information Act (FOIA).**

A long and complex history has surrounded that request. Recently, this Court remanded the case to the OFCCP to review the materials and determine whether withholding was required in light of *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979). There the Supreme Court concluded that because FOIA is solely a disclosure statute,

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* *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

** 5 U.S.C. § 552.

it did not bar release of documents even though they fell within one of the statute's exemptions. The *Chrysler* proceeding was remanded by the Supreme Court to determine whether the Trade Secrets Act, 18 U.S.C. § 1905, prohibited disclosure of the documents involved.

In this proceeding, the OFCCP filed its decision on this Court's remand in late 1980. A supplemental decision which considered and reviewed additional evidence, at the Court's instruction was filed in July 1981. The government has moved for judgment on the pleadings or summary judgment; CNA has moved to remand to the OFCCP or, alternatively, for a *de novo* trial before this Court.

The Court has considered the parties' memoranda of points and authorities and the administrative record, and concludes that the government is entitled to summary judgment and that the case should be dismissed.

BACKGROUND

CNA and its subsidiaries are principally engaged in the sale of various forms of insurance. A portion of their business consists of contracts or subcontracts with agencies of the United States Government.

It is important to summarize briefly the procedural history of this case to illustrate the numerous occasions and fora CNA has used in objecting to disclosure of its materials. In early 1975 a Chicago-based organization, Women Employed, requested portions of the 1974-1975 Affirmative Action Program (AAP) and related correspondence of a CNA subsidiary submitted to the Insurance Compliance Staff of the Social Security Administration pursuant to the equal employment opportunity program created under Executive Order 11246. Some materials were released after CNA was given notice and an opportunity to comment. CNA then pursued remedies in two federal district courts and before the OFCCP on appeal. These proceedings were terminated, however, because of uncertainty

over Women Employed's continued interest in the materials.

Later, in April 1977 Women Employed renewed its request and sought, in addition, the 1976-1977 AAP materials for a CNA regional office in Chicago. When notified that the 1974-1975 materials would be released, CNA filed this action and obtained a temporary restraining order enjoining release. This Court later denied CNA's motion to amend that order to include the 1976-1977 materials, whereupon it obtained an injunction from the Court of Appeals, as well as a stay of further proceedings pending the Supreme Court's decision in *Chrysler v. Brown*.

In that proceeding Chrysler sought to enjoin disclosure of its AAP information, supplied to the Department of Defense pursuant to Executive Orders 11246 and 11375.* The Supreme Court concluded that because FOIA was exclusively a disclosure statute, it does not afford a party the right to enjoin government disclosure of records. 441 U.S. at 294. The Court went on to consider whether the action could be maintained under the Trade Secrets Act, 18 U.S.C. § 1905, which made it a criminal offense for any government official to disclose confidential business information "to any extent not authorized by law." Concluding that the government had not demonstrated whether such authorization existed, the Court remanded the proceeding to determine whether section 1905 prohibited disclosure of the materials, subject to judicial review under the Administrative Procedure Act.** *Id.* at 318-19.

Following the *Chrysler* decision, the Court of Appeals remanded this proceeding and this Court in turn remanded the matter to the OFCCP for a new administrative determination in light of the Supreme Court's opinion in

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* Exec. Order 11375 amended Exec. Order 11246 in respects not relevant here.

** 5 U.S.C. § 706(2).

Chrysler and "in accordance with its normal rules of practice." The agency decision and order were issued on November 28, 1980. In re *CNA Financial Corporation*, 24 FEP Cases 877 (1980).

Subsequent to that filing, CNA made two motions: first, to compel production of two advisory reports of consulting economist Professor Boyd Fjelstad, prepared to aid the OFCCP Director in reaching his November decision; and second, to complete the administrative record with three depositions taken at an earlier stage of the proceeding. The government moved for a protective order with respect to the Fjelstad reports, asserting that they were privileged deliberative materials of agency decisionmakers. After examining the reports *in camera*, the Court concluded that Professor Fjelstad had in fact acted as an agency decisionmaker and that the reports were privileged. The Court granted the protective order but remanded the proceeding to the OFCCP to reevaluate its decision in light of the three depositions identified by CNA. The agency's supplemental decision affirming its November 1980 determination was filed on July 21, 1981.

The OFCCP Decision on Remand

On remand, the OFCCP Acting Director rejected CNA's request that an evidentiary hearing be provided to enable the company to offer expert testimony and cross-examine witnesses. Instead, the agency compiled materials from its earlier proceedings and invited CNA to submit any further arguments and documentation it wished. CNA did not respond to this offer.

The Acting Director first examined the scope of the protection afforded CNA by the Trade Secrets Act. He concluded that the Act did not operate as an exempting statute through exemption three of FOIA, section 552(b)(3), which allows withholding of information under specific author-

ization by another statute.* However, the OFCCP found section 1905 to be coextensive with exemption four, section 552(b)(4), which authorizes the agency to withhold confidential business information where disclosure is likely "to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974).

Turning to the AAP materials, the Acting Director concluded that all salary information should be withheld because of the privacy interest CNA employees have in confidentiality.** With respect to CNA's competitive harm claims, however, he rejected the company's arguments that release of "applicant flow data" – information on the number of applicants and job offers classified by minority group and sex – would lead to adverse public reaction, discourage minority and female applicants, and incite prejudices of independent agents who sell CNA insurance. He felt not only that the harmful effects of this nature were speculative, but stressed the agency's position that public disclosure of CNA's affirmative action efforts should be consistent with the company's equal opportunity goals and welcomed by the public. The agency also rejected the claim that revelation of the company's job promotion system would demoralize current employees and lead to "raiding" of its minority employees by competitors because of apparent limited promotion opportunities at CNA. The Acting Director found that corporate promotion information currently available to employees, as well as their own best

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*The agency also rejected CNA's argument that two other statutes prohibited disclosure in conjunction with exemption three: section 709(e) of the Civil Rights Act of 1964, which governs release of certain information by the Equal Employment Opportunity Commission, and 44 U.S.C. § 3508, which deals with the transfer of information between government agencies.

**See 5 U.S.C. § 552(b)(6).

estimates of job potential, made these claims speculative. Finally, the agency evaluated CNA's claims that the company's successful recruitment policies can be gleaned from its AAP materials for use by competitors at substantial cost saving and that staffing information in the materials would reveal to competitors CNA's promotional policies and practices by disclosing changes in market emphasis. Both arguments were rejected because the material, dating from 1974, is "stale." But the agency also found independent grounds against both arguments. Recruitment information in CNA's materials was so general, the OFCCP noted, that it must perforce already be available to CNA's competitors. And much of the information dealing with CNA's market practices is already publicly available through state regulations. Although the Acting Director concluded that release of the APP information would probably be of little incremental value over these public disclosures, it noted that the redaction of salary information on privacy grounds would also eliminate any conceivable competitive use of the information.

In July the Director issued a supplemental decision reflecting evaluation of the three depositions taken at earlier stages in the proceedings. Concluding that these materials added no new arguments or support for previous arguments, the Director affirmed the Acting Director's previous decision.

ANALYSIS

CNA advances several grounds to support its position that a remand to the OFCCP is once again called for. They assert: that the agency's own rules of practice contemplate a trial type proceeding; that the agency violated CNA's due process rights in that it failed to provide timely notice of the specific issues to be considered; and that due process was also violated by failing to provide CNA with an oral hearing before disposing of CNA's "valuable property right." Each argument is considered and found without merit.

A. OFCCP Rules of Practice on Remand

CNA argues that 41 C.F.R. Part 60-30 (1980) provides the procedure applicable in processing a government contractor's objections to disclosure of its AAP materials. The section provides for a formal, trial type hearing before an administrative law judge.

However, the hearing rules set out in Part 60-30 are expressly limited to proceedings concerning the enforcement of the Executive Order's equal opportunity goals. *Id.* § 60-30.1. Although the AAP materials at issue here were prepared in connection with the OFCCP's responsibility to enforce the presidential directive, a dispute over whether they are protected from disclosure under the Trade Secrets Act does not involve enforcement of equal opportunity. Specific aspects of the proceeding that would invoke Part 60-30 are also absent. For example, no complaint has ever been filed against CNA by the Solicitor of Labor and no statement of sanctions which the government seeks to impose was ever made. *Id.* § 60-30.5. Indeed, such procedures would be wholly inappropriate to this proceeding.*

The applicable rule for reviewing a contractor's objection to disclosure of its AAP materials, followed by the agency since this proceeding's inception, are set out in 41 C.F.R. §60-60.4(d) (1980). The section contemplates notice to CNA – the government contractor – and consideration of CNA's specific reasons why the information should not be disclosed. The rule does not set out in detail the procedure for review; rather, it contemplates an informal "paper hearing" on the company's objections. This rule has regularly been followed by the OFCCP in responding to

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* CNA also maintains that it is entitled to a hearing under 41 C.F.R. § 60-1.24 (c)(4), which allows a prime contractor who acquiesces in an OFCCP order to obtain a hearing on request. This provision, however, like Part 60-30, deals solely with enforcement of the Executive Order's equal opportunity provisions.

objections by companies to the release of their AAP materials.

Finally, contrary to CNA's contention, there is nothing in this or the court of appeals' remand orders suggesting that a trial type proceeding is required by the agency after *Chrysler*. Under the circumstances, the informal paper proceeding established under section 60-60.4(b) constituted the agency's "normal rules of practice" for determining reverse FOIA challenges.

B. Absence of Timely Notice

CNA next argues that the OFCCP's failure to provide it with notice of the "specific issues" that would be relied upon in rejecting the company's objections to disclosure in its final decision constitutes a denial of due process. While it is true that basic elements of fairness in administrative proceedings require that the parties receive "specificity of notice and an opportunity to respond," *Hess & Clark, Division of Rhodia, Inc. v. Food and Drug Administration*, 495 F.2d 975, 984 (D.C.Cir. 1974), here there is no question that those requirements were satisfied. The OFCCP made clear its position favoring disclosure to CNA on remand and offered to consider any objections to release of the AAP materials. The agency did not apprise CNA of specific issues because it did not intend to raise any. Rather, the onus was on the company to demonstrate that the materials should be exempt from FOIA's general requirement of disclosure. In this situation, unlike cases relied on by CNA where the government acted to a party's detriment without any explanation,* CNA has been denied neither timely notice nor an opportunity to respond.

See Transco, Inc. v. Freeman, III, No. 80-1355 (6th Cir., January 13, 1981); Old Dominion Dairy Products v. Secretary of Defense, 631 F.2d 953 (D.C.Cir. 1980). And unlike Zotos International, Inc., v. Kennedy, 460 F.Supp. 268 (D.D.C. 1978), the agency here did not conduct a wide ranging evidentiary search without informing the plaintiff.

Indeed, the only specific consideration CNA alleges it did not have timely notice of is the agency's conclusion that the company's competitor's would be able to make little use of its AAP material because the material is stale. It is somewhat disingenuous of CNA to argue that it was taken by surprise by this conclusion. These records date back to 1974 and it is readily apparent that their age would be a factor in any consideration of their confidentiality in a 1980 review proceeding. In addition, in both instances where the OFCCP relied on the staleness of the records for its determination, the agency also supported its conclusion with independent grounds. *See supra* at 5. Under the circumstances, it is pointless to remand the proceeding to the agency for renewed consideration of CNA's objections to this aspect of the agency's ruling.

C. Due Process Right to an Oral Hearing

CNA next contends that due process considerations confer a right to an oral hearing at some stage of this proceeding to protect its valuable property interest in its AAPs. Relying on a recent circuit court decision, *Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C.Cir. 1981), it argues that the request should be remanded for a hearing on due process grounds.

Any analysis of whether an oral hearing is required by due process should begin with *Mathews v. Eldridge*, 424 U.S. 319 (1976). There the Supreme Court provided that a consideration of three factors is required in determining what process is due in proceedings involving individual liberty or property interests:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute

procedural requirements would entail.

Id. at 335. In *Gray Panthers*, the Court of Appeals concluded that some kind of oral hearing, albeit "simplified, streamlined [and] informal," is required in connection with the denial of Medicare benefits even for amounts less than one hundred dollars. 652 F.2d at 172-73. In reaching this conclusion our circuit noted that the private interest is characterized by benefits to the elderly, a significant percentage of whom are disadvantaged by disability, illness and poverty and that because the elderly "are less able than the general populace to deal effectively with legal notice," an oral proceeding is particularly necessary to prevent an erroneous deprivation of their Medicare benefits. *Id.* at 166-68. The cost of this additional safeguard, the court concluded, could be minimized by engrafting a simplified, informal hearing process onto current procedures. *Id.* at 172-73.

The safeguards required to ensure a fair determination of Medicare benefits have little applicability to a national insurance company represented by highly competent counsel. CNA's attorneys have followed this proceeding closely since its inception, filing numerous pleadings and affidavits throughout. In contrast to plaintiffs in *Gray Panthers*, there is little need for the full evidentiary hearing CNA now seeks in order to safeguard its interest. Furthermore, the fiscal and administrative burden such a trial type procedure would entail – in contrast to the informal proceedings envisioned in *Gray Panthers* – would be tremendous.

Recently the court of appeals strongly suggested that a paper hearing such as conducted here is adequate to safeguard a business' interest in its reports submitted to the government. In *Worthington Compressors, Inc. v. Costle*, Nos. 80-1010 to 80-1013 (D.C.Cir. August 20, 1981), the Court held that the Environmental Protection Agency (EPA) improperly ordered disclosure under FOIA exemption four of appellant's noise pollution abatement reports

on its air compressors, without any notice or opportunity to comment on the decision. The Court held that a factual dispute existed as to whether the cost to competitors of obtaining the information by alternative means was so great as to give them a competitive advantage in having access to the reports. In remanding the case to the district court, the circuit court left open the question of whether resolution of this question by the court or by remand to the agency was appropriate. In the event of remand to the agency however, the court noted that the EPA's notice and comment procedures under 40 C.F.R. § 2.204(d)(1), which contemplate only a paper proceeding, provide appellants with sufficient procedural safeguards to satisfy their due process claim that they were denied an opportunity to be heard. *Id.* at 18 n. 48.

The paper hearing conducted by the OFCCP is substantially the same as that contemplated in *Worthington Compressors.*[*] Similarly, any due process claim CNA may have by virtue of alleged property interests in its AAP materials is satisfied by this procedure. As noted in *Mathews*, "[t]he judicial model of an evidentiary hearing is neither required, nor even the most effective, method of decisionmaking in all circumstances." 424 U.S. at 348. Here the additional safeguards afforded by an oral hearing "ultimately would contribute very little to the accuracy and reliability of the [agency's] determinations." *Basciano v. Herkimer*, 605 F.2d 605, 611 (2d. Cir. 1979).

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[*] Both parties have filed supplemental pleadings addressing the impact of *Worthington Compressors* on this case. The Court does not agree with plaintiffs' attempt to equate the OFCCP's paper proceeding conducted in this case with the EPA's summary procedure rejected by the court of appeals. There the EPA did not give Worthington Compressors an opportunity to present its claims of confidentiality. Here, in contrast, the OFCCP invited CNA on a number of occasions to submit any legal memoranda and affidavits. The OFCCP conducted a thorough paper proceeding similar to that endorsed in *Worthington Compressors.*

Aside from the three primary arguments, CNA also raises a number of claims that require little discussion. First, the OFCCP's conclusions that the Trade Secrets Act, is not an exempting statute under the third exemption of FOIA, but is coextensive with the fourth exemption, is amply supported by judicial precedent. *General Motors Corporation v. Marshall*, No. 80-1183, slip op. at 7-8 (4th Cir., July 17, 1981); *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 686-87 (D.C.Cir. 1976). And second, the agency's decision thoroughly discusses CNA's objections and presents "a reasoned and detailed basis for its decision" as required for review under section 706(a)(A) of the APA. *General Motors*, slip op. at 9. Finally, CNA argues that, in the absence of a remand, the Court is required to evaluate CNA's objections to disclosure in a *de novo* trial. The Supreme Court in *Chrysler* suggested that *de novo* review may be available under section 706(2)(F) of the APA to a party who challenges disclosure under the Trade Secrets Act. 411 U.S. at 318. Although the court did not set out the circumstances under which this would be appropriate, it stated that *"[d]e novo* review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905." *Id.* CNA has provided, and the Court is aware of, no reason why this proceeding should be considered so extraordinary in this regard to merit *de novo* review by this Court.

Accordingly, the Court concludes that, under 5 U.S.C. § 706 (2) (A), the OFCCP's decision is in accordance with law and that summary judgment should be granted to the defendants. An appropriate order accompanies this Memorandum Opinion.

Entered 29th October, 1981

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CNA FINANCIAL CORPORATION, et al.,
Plaintiffs,

v.

JAMES DONOVAN, et al.,
Defendants.

Civil Action No. 77-0808

FILED
OCT 29 1981

ORDER

In accordance with the accompanying Memorandum Opinion, it is this 29th day of October, 1981

ORDERED that plaintiffs' motion to remand or for trial *de novo* is denied and defendants' motion for summary judgment is granted; and it is

FURTHER ORDERED that all orders restraining defendants from releasing the documents involved in this proceeding are vacated and that defendant Office of Federal Contract Compliance Programs shall release, within fifteen days from the date of this order, the documents previously described in the November 28, 1980 order of that agency; and it is

FURTHER ORDERED that judgment is entered for the defendants and the case is dismissed with prejudice.

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

No. 81-2169

CNA FINANCIAL CORPORATION, ***et al.,***
Appellants,

v.

RAYMOND J. DONOVAN,
Secretary of Labor,
et al.

FILED SEPT 29 1987

BEFORE: **Wald,** Chief Judge;
Robinson and **Mikva,** Circuit Judges

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

No. 81-2169

CNA Financial Corporation,
et al.

v.

FILED DEC 1 1987

Donovan, Secretary of Labor,
et al.

BEFORE: **WALD**, Chief Judge;
ROBINSON and **MIKVA**, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

No. 81-2169 **CA No. 77-00808**

CNA Financial Corporation,
et al.

v.

FILED DEC 2 1987

Donovan, Secretary of Labor,
et al.

BEFORE: Wald, Chief Judge;
Robinson, Mikva, Edwards, Ruth B. Ginsburg,
Bork, Starr, Silberman, Buckley, Williams,
D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellants' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

Circuit Judge Edwards did not participate in this order.

APPENDIX B

NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D.C. CHAPTER

v.

SOCIAL SECURITY ADMINISTRATION,
736 F.2d 727 (D.C. Cir. 1984)

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D.C. CHAPTER

v.

SOCIAL SECURITY ADMINISTRATION OF the DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*
Prudential Insurance Company of America, Appellant.

Nos. 76-2119, 76-2128, 76-2129, 76-2163, 77-1161, 77-1269 and 77-1270.

Argued May 1, 1980.
Decided May 25, 1984.
As Amended July 2, 1984.

Appeal was taken from a judgment of the United States District Court for the District of Columbia, Oliver Gasch, J., which preliminarily enjoined release of much of the material sought under Freedom of Information Act from the Social Security Administration. The Court of Appeals affirmed. In a separate opinion concurring in the result, McGowan, Senior Circuit Judge, and Mikva, Circuit Judge, held that de novo review of agency's decision on Freedom of Information Act request by district court was inappropriate upon motion for preliminary injunction; furthermore, such review would have been inappropriate at trial on the merits since the submitter of information has no right of action under FOIA to enjoin disclosure.

Affirmed.

Spottswood W. Robinson, III, Chief Judge, filed opinion concurring in the affirmance.

Appeals from the United States District Court for the

District of Columbia (D.C. Civil Actions Nos. 76-0087, 76-0914).

Margaret A. Kohn, Washington, D.C., was on the brief, for National Organization for Women, appellants in No. 77-1161 and cross-appellants in Nos. 76-2119, 76-2128, 76-2129, 76-1269 and 77-1270. Collot Guerard, Washington, D.C., also entered an appearance for National Organization for Women, cross-appellants in Nos. 76-2119, 76-2128, 76-2129, 76-2163, 77-1269 and 77-1270.

Douglas N. Letter, Washington, D.C., with whom Alice Daniel, Acting Asst. Atty. Gen., Civil Division, Dept. of Justice, Carl S. Rauh, U.S. Atty., Washington, D.C., at the time the brief was filed, and Leonard Schaitman, Atty., Dept. of Justice, Washington, D.C., were on the brief for Social Security Administration of the Department of Health and Human Services, et al., cross-appellants in Nos. 77-1269 and 77-1270, and appellees in Nos. 76-2119, 76-2128, 76-2129, 77-1161 and 76-2163. John A. Terry, Asst. U.S. Atty., Washington, D.C., at the time the brief was filed, Richard A. Graham and Joseph Guerrieri, Jr., Asst. U.S. Attys., and Frederic D. Cohen, Atty., Dept. of Justice, Washington, D.C., also entered appearances for Social Security Administration, et al., cross-appellants in Nos. 77-1269 and 77-1270 and appellees in Nos. 76-2119, 76-2128, 76-2129, 77-1161 and 76-2163.

Michael S. Horne, Washington, D.C., with whom Jerome Ackerman and Bruce D. Sokler, Washington, D.C., for Prudential Insurance Company, J. Austin Lyons, Margaret F. Kelly, New York City, and James F. Bromley, Rockville, Md., for Metropolitan Life Insurance Company, and William F. Joy, Robert P. Joy, Boston, Mass., for John Hancock Mutual Life Insurance Company, were on the joint brief for the insurance company appellees and cross-appellants in Nos. 76-2119, 76-2128, 76-2129, 76-2163, 77-1161, 77-1269 and 77-1270.

Before ROBINSON, Chief Judge, MIKVA, Circuit

Judge, and McGOWAN, Senior Circuit Judge.

Opinion filed PER CURIAM.

Opinion filed by Chief Judge SPOTTSWOOD W. ROBINSON, III, concurring in affirmance.

Opinion filed by Circuit Judge MIKVA and Senior Circuit Judge McGOWAN concurring in affirmance.

PER CURIAM:

[1] The judgment of the District Court is affirmed. Chief Judge Robinson concurs for the reasons set forth in his opinion. Circuit Judge Mikva and Senior Circuit Judge McGowan concur for the reasons set forth in their opinion. The case is remanded to the District Court for further proceedings in accordance with instructions set forth in the opinion of Circuit Judge Mikva and Senior Circuit Judge McGowan.

SPOTTSWOOD W. ROBINSON, III, Chief Judge:

A federal regulatory agency ruled that documentary matter collected from regulatees is subject to public examination pursuant to the Freedom of Information Act (FOIA).[1] The District Court, after reviewing the agency's decision de novo, issued a preliminary injunction barring release of much of the material.[2] In that court's view, there is a substantial probability that the data thus impounded are removed from FOIA's disclosure mandate by Exemptions 4 and 6,[3] and that the proscriptions of the Trade Secrets Act[4] would brand voluntary agency divulgence an

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[1] 5 U.S.C. § 552 (1982).

[2] *Metropolitan Life Ins. Co. v. Usery*, 426 F.Supp. 150 (D.D.C.1976), *cert. before judgment denied sub nom. Prudential Ins. Co. v. National Org. for Women*, 431 U.S. 924, 97 S.Ct. 2198, 53 L.Ed.2d 238 (1977).

[3] *Id.* at 158-159, 167.

[4] 18 U.S.C. § 1905 (1982).

abuse of discretion.[5] We are asked to dissolve the court's injunction.

I would hold that de novo review on questions of exemption by FOIA was proper in the context in which it occurred,[6] and would leave undisturbed the District Court's determinations on the scope of the FOIA exemptions involved and the reach of the Trade Secrets Act.[7] I would conclude, however, that the court should not have undertaken to gauge, without prior assessment by the agency itself, the propriety of voluntary disclosure of items ostensibly exempted from FOIA's purview and left unprotected by the Trade Secrets Act.[8] I thus would remand for further proceedings.

I. BACKGROUND

A. The Regulatory Scheme

The three major insurance companies litigating here[9] are contractors with the Federal Government. As such, the companies are subject to Executive Order 11246,[10] which requires the Secretary of Labor to ensure that contractors' workforces are free from employment discrimination based on race, sex, religion or national origin. The Secretary has delegated this responsibility to the Office of Federal Contract Compliance Programs (OFCCP).[11] When

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[5] *Metropolitan Life Ins. Co. v. Usery, supra* note 2, 426 F.Supp. at 170.

[6] Discussed in Part II *infra*.

[7] Discussed in Part III *infra*.

[8] Discussed in Part III *infra*.

[9] See note 26 *infra*.

[10] 30 Fed.Reg. 12,319 (1965), as amended by Exec. Order No. 11375, 32 Fed.Reg. 14,303 (1967), *reprinted after* 42 U.S.C. § 2000e (1976 & Supp. V 1981).

[11] 41 C.F.R. § 60-1.2 (1983).

the cases at bar germinated, a number of federal entities served as "compliance agencies" monitoring equal employment opportunity within various geographical areas and industrial classifications. The unit so designated for the insurance industry was the Insurance Compliance Staff (ICS) of the Social Security Administration.[12]

OFCCP rules require government contractors to file annual statements, known as EEO-1 reports,[13] detailing the number of women and minority-group members working in specified job categories.[14] Additionally, each contractor must prepare an affirmative action plan projecting the employment of women and minorities, and establishing goals and timetables for correcting deficiencies.[15] Each contractor's affirmative action program is audited periodically, and on-site reviews are conducted when the contractor's submission is deemed unsatisfactory.[16] The results of these audits and reviews are then compiled in compliance review reports.[17]

The Department of Labor has promulgated regulations on disclosure of data obtained or generated pursuant to Executive Order 11246.[18] These rules instruct OFCCP to release such information voluntarily upon request–unless legally forbidden, but notwithstanding the availability of a

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[12] Contract-compliance authority has since been consolidated in OFCCP. See Exec. Order No. 12086, 43 Fed.Reg. 46, 501 (1978), *reprinted after* 42 U.S.C. § 2000e (Supp. V 1981).

[13] See Joint Appendix (J.App.) 280 (reprint of blank EEO-1 report).

[14] 41 C.F.R. § 60-1.7 (1983). Certain contractors, primarily those with small workforces or low dollar-value government contracts, are exempt from this requirement. *Id.* § 60-1.7(a)(1).

[15] *Id.* § 60-1.40 & pt. 60-2.

[16] *Id.* § 60-60.3.

[17] *Id.*

[18] *Id.* pt. 60-40.

FOIA exemption from mandatory release – whenever doing so would further the public interest and would not impede the agency's functions.[19] If, however, these two preconditions are not met, the agency must withhold FOIA-exempt portions of affirmative action plans, such as goals and timetables, constituting confidential commercial or financial information "because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public."[20] Also to be withheld, absent satisfaction of the two preconditions, is FOIA-exempt information on staffing patterns and pay scales in affirmative action plans, but only insofar as divulgence "would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee."[21]

With these and other limited exceptions,[22] the regulations thus favor voluntary disclosure of contract-compliance information – even that which, because exempt under FOIA, OFCCP is not compelled to reveal. Recognizing, however, that submitters of EEO-1 reports and affirmative action plans may have a justifiable interest in maintaining the confidentiality of particular data, the regulations also provide a process by which a contractor

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[19] *Id.* § 60-40.2(a). See also *id.* § 60-40.2(b). It is specifically provided that contractors' EEO-1 reports "shall be disclosed pending further instructions from the Director." *Id.* § 60-40.4.

[20] *Id.* § 60-40.3(a)(1).

[21] *Id.* § 60-40.3(a)(2).

[22] Information in four additional categories is treated similarly to staffing patterns and pay scales. *Id.* § 60-40.3(a)(3) to (a)(6). Apparently, none of these provisions is pertinent to any inquiry here.

may solicit protection.[23] An administrative determination on applicability of a FOIA exemption, or on discretionary release of exempt information, thus may arise either from a third party demand for disclosure or a contractor's request for nondisclosure.

B. The Administrative Proceedings

Metropolitan Life Insurance Company presented to ICS a statement seeking to preserve the confidentiality of portions of its affirmative action plans,[24] and ICS began to proceed under the regulations.[25] Shortly thereafter, the District of Columbia Chapter of the National Organization for Women (NOW) requested all EEO-1 reports, current affirmative action plans and compliance review reports pertaining to four insurance companies, including Metropolitan.[26]

ICS notified the companies of NOW's application and offered each an opportunity to demonstrate that, under the guidelines supplied by the regulations, the information sought should not be revealed. At the same time, ICS asked NOW for clarification of the scope of its demand.[27] NOW treated this response as the equivalent of a denial and instituted an administrative appeal,[28] but ICS con-

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[23] *Id.* § 60-60.4(d). This procedure is decribed in Part II(C) *infra*.

[24] J.App. 46-47.

[25] J.App. 51.

[26] J.App. 30. The companies are John Hancock Mutual Life Insurance Company, Metropolitan Life Insurance Company, Prudential Life Insurance Company of America and Equitable Life Assurance Society. The first three, but not the fourth, have challenged the agency decisions.

[27] J.App. 31-33.

[28] ICS had indicated to NOW that this was an available alternative. See J.App. 32.

tinued to consider NOW's bid along with oppositions presented by the companies. Somewhat later, ICS, addressing the companies' challenges, informed them of its decision to release most of the data requested.[29]

Resorting both to FOIA and the OFCCP regulations, ICS believed that a few items in the affirmative action plans should be excluded from NOW's inspection because public availability would cause competitive harm.[30] ICS also felt that additional items should be withheld because their release conceivably could result in unwarranted invasions of personal privacy.[31] As to the remainder, however, ICS rejected company arguments that particular FOIA exemptions applied, and ordered disclosure.[32] The companies appealed to the Director of OFCCP,[33] who substantially affirmed ICS' decision.[34]

C. The Judicial Proceedings

While its efforts at the agency level continued, Metropolitan instituted an action in the District Court for the Southern District of New York, and sought a temporary restraining order blocking release of its affirmative

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[29] J.App. 284-323.

[30] See, *e.g.*, J.App. 292 (organizational chart of Wichita Electronic Installation Center); J.App. 293 (portion of affirmative action plan for Las Posas District sales office withheld because of potential for "raiding" clerical staff).

[31] See, e.g., J.App. 291 (identification of employee, when employee's name appeared in document in connection with evaluation of his or her job performance).

[32] In doing so, ICS rejected claims grounded not only on Exemption 4, but also on Exemptions 3, 6 and 7. See J.App. 286-287, 288-289, 290, 291, 304-305. These exemptions are codified at 5 U.S.C. § 552(b)(3), (4), (6), (7) (1982).

[33] See 41 C.F.R. § 60-60.4(d) (1983).

[34] J.App. 324-337. The Director also ordered release of certain data withheld by ICS.

action statistics until administrative remedies could be exhausted.[35] Counsel for the Government[36] stipulated that no disclosure would take place until five days after full resort through those channels, and the other companies were subsequently assured of similar treatment.[37] Resultantly, though Metropolitan's lawsuit remained pending, its request for the restraining order was withdrawn.[38]

Several months later, after pursuing its own administrative remedies, NOW initiated a separate action in the District Court for the District of Columbia[39] to compel ICS officials to reveal the data in dispute.[40] After a contest over venue, the two cases were consolidated in the District of Columbia.[41] Only after both suits commenced did ICS resolve to unveil substantial portions of the material sought by NOW.[42] Following affirmance of this decision

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[35] See Complaint, J.App. 326 (Metropolitan), 336 (Hancock). *Metropolitan Life Ins. Co. v. Dunlop*, Civ. No. 75-4182 (S.D.N.Y.) (filed Aug. 22, 1975), J.App. 34-45.

[36] Aside from NOW and the three insurance companies, the Department of Health and Human Services and five federal officials are litigants in this case. For convenience, I refer to the federal parties collectively as "the Government."

[37] See J.App. 32.

[38] See J.App. 32. Withdrawal was accomplished by means of a stipulation, appended as an exhibit to one of the pleadings.

[39] Although ICS had not then reached a decision on the merits of NOW's request, administrative remedies were considered exhausted because the agency had not met the applicable time limit set out in 45 C.F.R. §§ 5.81, 5.85(c) (1983). Complaint, *National Org. for Women v. Social Sec. Admin.*, Civ. No. 76-0087 (D.D.C.), (filed Jan. 16, 1976) ¶ 26, J.App. 22. See 5 U.S.C. § 552(a)(6)(C) (1982).

[40] See Complaint, *supra* note 39, J.App. 14-33.

[41] *Metropolitan Life Ins. Co. v. Usery*, *supra* note 2, 426 F.Supp. at 155.

[42] *Id.* & n. 5.

on administrative appeal, the companies applied to the District Court in the consolidated litigation for a temporary restraining order barring release pending a hearing on a motion for a preliminary injunction.[43]

The restraining order issued, and the court heard evidence on the matter of interim injunctive relief.[44] The court later handed down its order granting a partial preliminary injunction.[45] The court agreed with the agency that FOIA Exemption 3[46] and 7[47] did not apply,[48] but rejected agency arguments that Exemptions 4[49] and

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[43] Motion for Temporary Restraining Order, for Preliminary Injunction and for Protective Order, *Metropolitan Life Ins. Co. v. Usery*, Civ. No. 76-914 (D.D.C.) (filed July 16, 1976), J.App. 105-107.

[44] See *Metropolitan Life Ins. Co. v. Usery*, *supra* note 2, 426 F.Supp. at 155 & n. 8.

[45] *Id.* at 156.

[46] At the time the District Court rendered its decision, Exemption 3 pertained to information "specifically exempted from disclosure by statute." Act of June 5, 1967, Pub.L. No. 90-23, § 552(b)(3), 81 Stat. 54, 55. Subsequent to the District Court's ruling, this exemption was narrowed to information "specifically exempted from disclosure by statute (other than [the open meeting provisions of 5 U.S.C. § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." Government in the Sunshine Act, Pub.L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976), codified at 5 U.S.C. § 552(b)(3) (1982).

[47] Exemption 7 relates to investigatory records compiled for law enforcement purposes. See 5 U.S.C. § 552(b)(7)(1982).

[48] *Metropolitan Life Ins. Co. v. Usery*, *supra* note 2, 426 F.Supp. at 157-158, 169-170.

[49] Exemption 4 extends to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (1982).

6[50] were likewise inoperative.[51] The court perceived a substantial likelihood that the companies ultimately would prevail on the merits of some of their exemption claims, finding that release of workforce analyses, department lists, and statistical and narrative data on projected promotions could seriously endanger competitive positions by subjecting the companies to increased risks of employee "raiding" and adverse effects on productivity.[52] The court was also impressed by the companies' contention that divulgence of various other items could trespass upon personal privacy because of the possibility that these data could be connected to particular individuals.[53] The court took live testimony as well as the agency record into account,[54] and its findings were independent determinations.

Because information exempted by FOIA from mandatory disclosure may nevertheless remain open to discretionary revelation by an agency,[55] the District Court went on to consider whether the data-releasing decisions made administratively impinged upon the Trade Secrets Act or otherwise amounted to an abuse of agency discretion, and answered both aspects of that question in the

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[50] Exemption 6 applies to personnel, medical and similar files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1982).

[51] See *Metropolitan Life Ins. Co. v. Usery*, *supra* note 2, 426 F.Supp. at 158-165, 166-169.

[52] *Id.* at 160-166.

[53] *Id.* at 166-169.

[54] *Id.* at 157 & n. 8.

[55] *Chrysler Corp. v. Brown*, 441 U.S. 281, 290-294, 99 S.Ct. 1705, 1712-1714, 60 L.Ed.2d 208, 218-220 (1979); *Charles River Park "A", Inc. v. HUD*, 171 U.S.App.DC. 286, 292, 519 F.2d 935, 941 (1975). See also *Worthington Compressors, Inc. v. Costle*, 213 U.S.App.D.C. 200, 209, 662 F.2d 45; 54 (1981).

affirmative.[56] Concluding that the companies had shown a substantial probability of successfully resisting disclosure, the court weighed other factors bearing on the propriety of preliminary injunctive relief–injury to the parties, respectively, and pertinent facets of the public interest[57] – and held that relief of that character was warranted.[58]

The injunction issued accordingly. In practical effect, it precludes release of the bulk of the affirmative action plans, and the compliance review reports to the extent that the latter incorporate data contained in the plans.[59] The District Court held that the disclosures permitted "should be sufficient to foster [the] goals" of equal opportunity.[60] NOW contends, however, that the material made available will be of little if any value without the portions withheld.[61]

The parties have tendered for our consideration a number of problems, most of which are beyond the range of our proper function. The appeals before us emanate, not from a final disposition of the controversy by the District Court, but from a preliminary injunction designed to preserve the

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[56] *Metropolitan Life Ins. Co. v. Usery, supra* note 2, 426 F.Supp. at 170-172.

[57] *Id.* at 172-173.

[58] *Id.*

[59] The injunction did permit, however, disclosure of all EEO-1 reports, and some portions of the affirmative action plans and compliance review reports. *Id.* at 157.

[60] *Id.* at 173.

[61] NOW claims that "what remains is largely the training data, information on hires and terminations and past promotions, census data on workforce availability, and general policy statements which alone have extremely limited value for D.C. NOW's purposes." Brief for NOW at 6 (footnote omitted). NOW states, for example, that the injunctive order tolerates release at most of but 15 pages of one affirmative action plan comprising 117 pages, and 60 to 70 pages of another consisting of 232 pages. *Id.* at 6 nn. 8 & 9.

status quo pending that court's decision on the merits,[62] and the scope of review is correspondingly limited. We have hitherto observed that "[w]hile the probability of success on the merits is a factor to be considered on a motion for preliminary injunction, such an application 'does not involve a final determination of the merits,' but rather 'the exercise of a sound judicial discretion' on the need for interim relief."[63] It is for this reason that we have frequently reminded that we "will not set aside the action of [the] District Court in either denying or granting an application for a preliminary injunction unless the action of the District Court was in clear error or in [*sic*] abuse of discretion,"[64] and that we ordinarily "do not consider the merits of the case further than necessary to determine whether that discretion was abused."[65] These constraints limit the issue properly before us to relatively few.

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[62] The application for the preliminary injunction was not consolidated with trial on the merits, as it might have been. See Fed.R.Civ.P. 65(a)(2); *Industrial Bank v. Tobriner,* 132 U.S.App.D.C. 51, 54, 405 F.2d 1321, 1324 (1968). We have been informed that the District Court suggested consolidation, but that both NOW and the Government objected. Brief for Insurance Companies at 24.

[63] *Industrial Bank v. Tobriner, supra* note 62, 132 U.S.App.D.C. at 54, 405 F.2d at 1324, quoting *Public Serv. Comm'n v. Wisconsin Tel. Co.,* 289 U.S. 67, 70, 53 S.Ct. 514, 515, 77 L.Ed. 1036, 1038 (1933). See notes 138-140 *infra* and accompanying text.

[64] *Cox v. Democratic Cent. Comm.,* 91 U.S.App.D.C. 416, 200 F.2d 356 (1952). Accord, *Jones v. District of Columbia Redev. Land Agency,* 162 U.S.App.D.C. 366, 371, 499 F.2d 502, 507 (1974); *Maas v. United States,* 125 U.S.App.D.C. 251, 254-255, 371 F.2d 348, 351-352 (1966); *Young v. Motion Picture Ass'n of Am., Inc.,* 112 U.S.App. 35, 37, 299 F.2d 119, 121, *cert. denied,* 370 U.S. 922, 82 S.Ct. 1565, 8 L.Ed.2d 504 (1962). See also *Brown v. Chote,* 411 U.S. 452, 457, 93 S.Ct. 1732, 1735, 36 L.Ed.2d 420, 424 (1973).

[65] *Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv.,* 159 U.S.App.D.C. 158, 164, 487 F.2d 1029,

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II. METHODOLOGY OF REVIEW

In disposing of the companies' injunctive motion, the District Court convened a hearing, at which it admitted evidence on the effects that public release of the companies' data would have on their business operations.[66] The court weighed that evidence, and freely substituted its factual assessments for those previously made administratively.[67] Then, to the factual situation so constructed, the court applied legal principles as it perceived them, and held that, as a matter of substantial probability, the information sought by NOW largely would be insulated from mandatory disclosure, primarily by FOIA Exemption 4[68] and to a lesser extent by Exemption 6.[69]

These determinations, in their factual as well as their legal components, thus were made de novo,[70] and that, it

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1035 (1973). Accord, *Jones v. District of Columbia Redev. Land Agency, supra* note 64, 162 U.S.App.D.C. at 371, 499 F.2d at 507; *Industrial Bank v. Tobriner, supra* note 62, 132 U.S.App.D.C. at 54, 405 F.2d at 1324; *Maas v. United States, supra* note 64, 125 U.S.App.D.C. at 255, 371 F.2d at 352; *Young v. Motion Picture Ass'n of Am., Inc., supra* note 64, 112 U.S.App.D.C. at 37, 299 F.2d at 121.

66 *Metropolitan Life Ins. Co. v. Usery, supra* note 2, 426 F.Supp. at 170-172.

67 *Id.* at 155 n. 8, 158-160.

68 *Id.* at 160-166.

69 *Id.* at 166-169.

70 When I speak of "de novo review," I refer to " 'the distinction between a de novo trial, where the case is tried a second time and the record is made up in the district court, and a court's review of findings of an administrative body, where the record is solely that of the administrative body.' " *Local 777, Democratic Union Org. Comm. v. NLRB*, 195 U.S.App.D.C. 280, 310, 603 F.2d 862, 892 (1978), quoting *Globe-Union, Inc. v. Chicago Tel. Supply Co.*, 103 F.2d 722, 728 (7th Cir.1939). It was in that vein that in *Local*

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is contended, was error. The claim is that, in deciding whether particular material fell within a FOIA exemption, the District Court should have confined itself to the record as developed administratively, and should have upheld the agency rulings unless they reflected some abuse of discretion or some mistake of law. Consequently, so the argument goes, the District Court went astray when it took new evidence into account, and again when it took new evidence into account, and again when it made factual findings of its own.

It is true that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, . . . consideration is to be confined to the administrative record and . . . no *de novo* proceeding may be held."[71] It is also true that support for the theory espoused by the companies' opponents can be found in judicial decisions[72] and legal commentary.[73] I think, however, that Congress has specified the procedure

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777 we held that a court determining whether uncontroverted facts, when tested by settled principles of law, are sufficient to warrant agency action does not engage in de novo review of the agency's decision. 195 U.S.App.D.C. at 310, 603 F.2d at 892.

[71] *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715, 83 S.Ct. 1409, 1413, 10 L.Ed.2d 652, 657 (1963). See also *Doraiswamy v. Secretary of Labor*, 180 U.S.App.D.C. 360, 367-371, 555 F.2d 832, 839-843 (1976).

[72] See, *e.g.*, *Chrysler Corp. v. Schlesinger*, 611 F.2d 439, 440 (3d Cir.1979) (opinion on remand). *Cf. General Motors Corp. v. Marshall*, 654 F.2d 294, 298-299 (4th Cir.1981).

[73] See, *e.g.*, Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 Geo.L.J. 103, 136-143 (1978); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex.L.Rev. 587, 628-633 (1977); Note, *The Reverse FOIA Suits After Chrysler: A New Direction*, 48 Fordham L.Rev. 185, 190-191 (1979).

appropriate for the situation here, and that, in the circumstances presented, the District Court's technique was eminently correct.

A. The Issue

I begin my analysis by sharply defining the problem. The companies' right to judicial review of OFCCP's disclosure decision rests wholly on Section 10 of the Administrative Procedure Act (APA).[74] It follows necessarily that Section 10 dictates the terms upon which the review was to be conducted, and, when that section is examined, any uncertainty as to the propriety of independent *legal* rulings by the court is immediately eliminated. Section 10 provides that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law [and] interpret . . . statutory provisions. . . ."[75] This directive accords with the traditional understanding that questions of law,[76] and statutory meanings as questions of law,[77] are for courts, not agencies. While on legal inquiries,[78] typically those of statutory construction, courts

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[74] *Chrysler Corp. v. Brown, supra* note 55, 441 U.S. at 317-318, 99 S.Ct. at 1725-1726, 60 L.Ed.2d at 234-235.

[75] 5 U.S.C. § 706 (1982).

[76] *E.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145, 60 S.Ct. 437, 442, 84 L.Ed. 656, 663 (1940); *FPC v. Pacific Power & Light Co.*, 307 U.S. 156, 160, 59 S.Ct. 766, 768, 83 L.Ed. 1180, 1183 (1939); *Retail Store Union v. NLRB*, 151 U.S.App.D.C. 209, 219, 466 F.2d 380, 390 (1972).

[77] *E.g., Railroad Retirement Bd. v. Bates*, 75 U.S.App.D.C. 251, 252, 126 F.2d 642, 643 (1942); *Northern Natural Gas Co. v. O'Malley*, 277 F.2d 128, 137 (8th Cir.1960); *Miller v. Burger*, 161 F.2d 992, 994 (9th Cir.1947).

[78] In resolving questions of law, courts should give some deference to the administrative decision when the agency has a lengthly record of practical experience with the subject matter,

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yield agencies varying degrees of deference, it is the court, not the agency, that has the final say.[79] And while the law-

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Levinson v. Spector Motor Serv., 330 U.S. 649, 672, 67 S.Ct. 931, 943, 91 L.Ed. 1158, 1173 (1947), or technical knowledge of relevant industry conditions and practices, *Alexander v. FERC*, 197 U.S.App.D.C. 288, 292-293, 609 F.2d 543, 547-548 (1979); *Columbia Gas Transmission Corp. v. FPC*, 174 U.S.App.D.C. 204, 207, 530 F.2d 1056, 1059 (1976). But absent factors of this nature, administrative rulings on legal questions are not entitled to any particular degree of homage. *H.W. Wilson Co. v. United States Postal Serv.*, 580 F.2d 33, 37 (2d Cir.1978); *Institute for Scientific Information v. United States Postal Serv.*, 555 F.2d 128, 132 (3d Cir.1977). See also *Retail Store Union v. NLRB*, *supra* note 76, 151 U.S.App.D.C. at 219, 456 F.2d at 390.

[79] Courts "will accord great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction," but that "is only one input in the interpretational equation." *Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 327, 24 L.Ed.2d 345, 360 (1969). Moreover, an agency's interpretation of a statute of general applicability – like FOIA – hardly commands the same weight as its interpretation of its own substantive mandate. See *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 236 n. 6, 93 S.Ct. 810, 816 n. 6, 35 L.Ed.2d 223, 234 n. 6 (1973); *International Tel. & Tel. Corp. v. Local 134, Int'l Bhd. of Elec. Workers*, 419 U.S. 428, 441, 95 S.Ct. 600, 609, 42 L.Ed.2d 558, 569 (1975). Courts, not agencies, have final responsibility for matters of statutory construction, even of the agency's own enabling legislation. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23, 30 (1981) ("[t]he interpretation put on the statute by the agency charged with administering it is entitled to deference, but the courts are the final authorities on issues of statutory construction") (citations omitted); *SEC v. Sloan*, 436 U.S. 103, 118, 98 S.Ct. 1702, 1712, 56 L.Ed.2d 148, 161 (1978) ("[n]or does the existence of a prior administrative practice, even a well-explained one, relieve [the court] of [its] responsibility to determine whether that practice is consistent with the agency's statutory authority"); *Zuber v. Allen*, *supra*, 396 U.S. at 193, 90 S.Ct. at 328, 24 L.Ed.2d at 360 ("[t]he [c]ourt may not . . . abdicate its ultimate responsibility to construe the language

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fact distinction has blurred considerably of late,[80] that much of the judicial role remains substantial and vital,[81] and clearly so where, as here, it is statutorily mandated.

The District Court's function extended, then, to resolution of legal problems incidental to determining the applicability of claimed exemptions to the information in suit.[82] The issue thus is reduced to whether, in passing on exemption questions, the court similarly was free to redetermine the *facts* upon which its rulings were to be predicated.[83] I must emphasize that the inquiry at this

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79 *(Continued)*
employed by Congress"); *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090, 1098 (1968) ("the courts are the final authorities on issues of statutory construction"); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 1043, 13 L.Ed.2d 904, 914 (1965) ("while informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis [statutory words] must get their final meaning from judicial construction").

80 See 4 K. Davis, Administrative Law Treatise §§ 30.01-30.04 (1958 & Supp.1970, 1982); *id.* § 30.00 (Supp.1970, 1982); K. Davis, Administrative Law of the Seventies §§ 30.00, 30.02 (1976).

81 See 4 K. Davis, Administrative Law Treatise §§ 30.01-30.04 (1958 & Supp.1970, 1982); *id.* § 30.00, 30.02 (1976).

82 While, to simplify the demonstration, I will discuss de novo review in the context of Exemption 4, the same analysis obtains in the instance of any other FOIA exemption dependent in any way on particular facts.

83 This question was not before the Supreme Court in *Chrysler Corp. v. Brown*, *supra* note 55. The Court pointed out that the Third Circuit, in the decision under review, had "assumed for purposes of argument that the material in question was within an exemption to the FOIA, [and thus had] found it unnecessary expressly to decide that issue. . . ." 441 U.S. at 319 n. 49, 99 S.Ct. at 1726 n. 49, 60 L.Ed.2d at 235 n. 49. Consequently,

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point concerns the District Court's methodology for ascertaining whether information in dispute was exempt from FOIA's mandatory release requirement, not whether the agency, in an exercise of its discretion, could have released it despite its exempt status. With respect to this particular phase of the litigation, and in view of the caliber of fact-finding procedures afforded at the agency level, I conclude that the court was authorized to amplify the administrative record through the admission of new evidence, and to make its own findings of fact.

B. The Statutory Rule

The District Court explained why it chose de novo review as the procedural route to ascertainment of the extent to which the documentary matter in controversy might have been intercepted by one or more of FOIA's exemptions:

> In a reverse-FOIA case the threshold question is whether the documents sought are subject to mandatory disclosure or fall within an exemption to the Act. If the documents sought are subject to mandatory disclosure, the lawsuit is at an end. If the documents, or portions thereof, fall within an exemption to mandatory disclosure, the Act does not apply and the agency's decision to disclose the documents is subject to reversal only for an abuse of discretion. In determining whether any exemptions apply to the information which the agency intends to disclose, the Court is not confined to reviewing the agency record. Even under APA review, the Court must hold a hearing and determine *de novo* whether an exemption

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83 *(Continued)*
the controversy concerned, not exemption from mandatory disclosure, but rather the propriety of discretionary release, a matter I addressin Part III *infra*. Accordingly, the Court's discussion of de novo judicial review, *id.* at 318-319, 99 S.Ct. at 1726, 60 L.Ed.2d at 235, must be taken in that context.

applies just as if the suit were one brought to compel disclosure.[84]

That, undeniably, was the procedure we outlined some years ago in *Charles River Park "A," Inc. v. HUD*.[85] There we theorized that judicial exploration into whether submitted information was exempt did not amount to review of agency action, but was merely inquiry as to whether the submitter had any cause of action for restraint of a contemplated public release.[86] Subsequently, however, in *Chrysler Corp. v. Brown*,[87] the Supreme Court made clear that the submitter's sole entree into court is an action for review of the agency's disclosure decision under the APA.[88] NOW and the Government emphasize this point, arguing that in consequence the review is to be conducted solely on the administrative record, and that the agency's

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[84] *Metropolitan Life Ins. Co. v. Usury*, *supra* note 2, 426 F.Supp. at 156-157 (citations omitted).

[85] 171 U.S.App.D.C. at 291 & n. 4, 519 F.2d at 940 & n. 4.

[86] We elucidated:

> A plaintiff in a suit such as this is obviously entitled to no relief if the government could be forced to disclose the information it wishes to reveal in a suit under the FOIA. Thus, the district court should hold a hearing to determine whether the information involved . . .would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. In holding this hearing the district court is not reviewing agency action; it is making a threshold determination whether the plaintiff has any cause of action at all.

Id. at 291 n. 4, 519 F.2d at 940 n. 4 (citations omitted).

[87] *Supra* note 55.

[88] *Chrysler Corp. v. Brown*, *supra* note 55, 441 U.S. at 317-318, 99 S.Ct. at 1725-1726, 60 L.Ed.2d at 234-235. The Court rejected two alternative bases: FOIA itself, *id.* at 291-294, 99 S.Ct. at 1712-1714, 60 L.Ed.2d at 218-220, and the Trade Secrets Act, *id.* at 316-317, 99 S.Ct. at 1725, 60 L.Ed.2d at 234.

outcome on applicability of exemptions is to be tested exclusively by an abuse-of-discretion standard. We recently acknowledged[89] that *Chysler* poses the question of continued viability of our holding in *Charles River Park "A"* on de novo review of exemption rulings.[90] Squarely addressing that question, and accepting the APA's pilotage on procedure, I believe de novo reconsideration of the exemption claims was entirely proper here.

I start from the premise that attempts to enjoin agency disclosure of information constitute review of agency action, and then turn to the APA's Section 10, the wellspring of the information-submitter's right to sue. It directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions" falling within any of six different categories,[91] including any administrative rulings found to be "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." [92] This provision, as construed by the Supreme Court, is narrow in scope, and authorizes de novo factfinding in only two instances.[93] One of these is

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[89] *Worthington Compressors, Inc. v. Gorsuch*, 215 U.S.App.D.C. 339, 340-341, 668 F.2d 1371, 1372-1373 (1981) (denying petition for rehearing).

[90] It long has been our rule that a recent decision of one panel cannot be overruled by another panel, but only by the court *en banc*. *E.g., Insurance Agents' Int'l Union v. NLRB*, 104 U.S.App.D.C. 218, 260 F.2d 736 (1958), *aff'd*, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960); *Davis v. Peerless Ins. Co.*, 103 U.S.App.D.C. 125, 127, 255 F.2d 534, 536 (1958). This principle is, of course, subservient to the requirement that we observe controlling precedent established by the Supreme Court.

[91] 5 U.S.C. § 706(2)(1982).

[92] *Id.* § 706(2)(F).

[93] *Camp v. Pitts*, 411 U.S. 138, 141-142, 93 S.Ct. 1241, 1243-1244, 36 L.Ed.2d 106, 110-111 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136, 153 (1971).

"when the action is adjudicatory in nature and the agency factfinding procedures are inadequate," [94] and that, in my view, is the situation here.

Indubitably, the proceedings culminating in the administrative decisions to release company-submitted data were adjudicatory in character.[95] Confronting the

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[94] *Citizens to Preserve Overton Park, Inc. v. Volpe, supra* note 93, 401 U.S. at 415, 91 S.Ct. at 823, 28 L.Ed.2d at 153. See also *Camp v. Pitts, supra* note 93, 411 U.S. at 142, 93 S.Ct. at 1244, 36 L.Ed.2d at 111.

[95] The distinction between adjudicative and legislative facts is now well recognized:

> Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but the general facts which help the tribunal decide questions of law and policy and discretion. * * *
>
> Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts.

2 K. Davis, Administrative Law Treatise § 12:3 at 413 (2d ed.1979). This concept is at the heart of Fed.R.Evid. 201, respecting which the Advisory Committee spoke of "fundamental differences between adjudicative facts and legislative facts," and explained that "[a]djudicative facts are simply the facts of the

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agency were the questions whether any of the material was immunized from mandatory divulgence by one or more FOIA exemptions and, to the extent that it was, whether the agency could and should nonetheless disclose it. The first of these questions, and the only one certainly decided at the administrative level,[96] called for an assessment of the harm, if any, that disclosure likely would visit upon the submitter's competitive position in the insurance industry.[97] The facts

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95 *(Continued)*
particular case" while "[l]egislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Advisory Committee Note to Fed.R.Evid. 201(a).

96 It does not clearly appear that OFCCP ever reached the question whether it would, in the exercise of its discretion, voluntarily release information determined to be exempt from mandatory disclosure under FOIA. Compare, *e.g.*, J.App. 324 (noting without elaboration that FOIA exemptions are permissive not mandatory) with, *e.g.*, J.App. 326 (stating that Exemption 4 test was not met by companies).

97 "[C]ommercial or financial matter is 'confidential' for purposes of [Exemption 4 of FOIA] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Morton*, 162 U.S.App.D.C. 223, 228, 498 F.2d 765, 770 (1974) (footnote omitted). Accord, *National Parks & Conservation Ass'n v. Kleppe*, 178 U.S.App.D.C. 376, 380-381, 547 F.2d 673, 677-678 (1976). Because submission of equal employment and affirmative action material is generally compulsory for those who would contract with the Federal Government, see notes 13-17 *supra* and accompanying text, the first prong of the *National Parks* test, which focuses on the Government's ability to obtain information, is not at issue here. *Worthington Compressors, Inc. v. Costle*, *supra* note 55, 213 U.S.App.D.C. at 206, 662 F.2d at 51; *National Parks & Conservation Ass'n v. Kleppe*, *supra*, 162 U.S.App.D.C. at 228, 498 F.2d at 770.

vital to that inquiry were "the facts of the particular case" [98] – those "pertaining to the parties and their businesses and activities" [99] – and the process by which they were to be ascertained from the evidence was distinctly adjudicative.[100] The critical question, then, is whether the agency's factfinding mechanism was equal to the task.

C. The Adequacy of Agency Factfinding Procedures

As noted earlier, regulations of the Department of Labor inform the administrative handling of requests for either confidentiality or disclosure of data obtained from government contractors.[101] These materials, the regulations warn, are subject to FOIA's public inspection and copying mandates.[102] Contractors are permitted, however, to identify information in their affirmative action programs and included workforce analyses which they deem exempt from compulsory release under FOIA, and to specify reasons for nondisclosure.[103] An agency officer must pass on a contractor's claim within ten days and, should the contractor appeal from an adverse ruling, the agency's director must make the final determination within another ten-day period.[104] That was the methodology employed in the cases now before us[105] and, so far as we are advised, is the sum

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[98] Advisory Committee Note to Fed.R.Evid. 201(a), quoted in part *supra* note 95.

[99] 2 K. Davis, Administrative Law Treatise § 12:3 at 413 (2d ed.1979), quoted *supra* note 95.

[100] See 2 K. Davis, Administrative Law §§ 12:3, 12:4 (2d ed.1979). See also notes 24-34 *supra* and accompanying text.

[101] See text *supra* at notes 18-23.

[102] 41 C.F.R. §§ 60-40.2 to 60-40.4, 60-60.4(d), (e)(1983).

[103] *Id* § 60-60.4(d).

[104] *Id.*

[105] See text *supra* at notes 27-34.

total of the procedure the agency affords for resolution of even the most complex of the variegated factual issues that FOIA exemptions can and frequently do present.

The caselaw offers little guidance for determinations on whether agency factfinding procedures are adequate within the meaning of Section 10 of the APA, as interpreted by the Supreme Court.[106] I perceive no occasion,

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[106] See text *supra* at notes 91-94. Sometimes, in lieu of purely statutory treatment, the Due Process Clause of the Fifth Amendment is invoked. *E.g., Ralpho v. Bell,* 186 U.S.App.D.C. 368, 389-390, 569 F.2d 607, 628-629 (1977); *American & European Agencies v. Gillilland,* 101 U.S.App.D.C. 104, 106, 247 F.2d 95, 97, *cert. denied,* 355 U.S. 884, 78 S.Ct. 152, 2 L.Ed.2d 114 (1957); *Carson Prods. Co. v. Califano,* 594 F.2d 453, 459 (5th Cir.1979); *Del Laboratories, Inc. v. United States,* 86 F.R.D. 676, 680-683 (D.D.C. 1980); *Zotos Int'l, Inc. v. Kennedy,* 460 F.Supp. 268, 274-276 (D.D.C.1978). Since, however, I conclude that OFCCP's factfinding procedures were in one respect deficient in terms of the APA, I do not reach the question whether they satisfy the demands of due process. See, *e.g., Wolston v. Reader's Digest Ass'n,* 443 U.S. 157, 160-161 n. 2, 99 S.Ct. 2701, 2704 n. 2, 61 L.Ed.2d 450, 456 n. 2 (1979) (dispositive issues of statutory law are to be treated before constitutional issues); *Bowen v. United States,* 422 U.S. 916, 920, 95 S.Ct. 2569, 2573, 45 L.Ed.2d 641, 647 (1975)(federal courts will not decide constitutional questions unnecessarily). This is not to say, however, that due process determinations are inapposite here. There obviously is at least some degree of commonality between statutorily – required adequacy of agency factfinding procedures and the imperatives of due process. See *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.,* 419 U.S. 281, 288 n. 4, 95 S.Ct. 438, 443 n. 4, 42 L.Ed.2d 447, 457 n. 4 (1974). See also *Porter v. Califano,* 592 F.2d 770, 782-784 (5th Cir.1979) (citing due process cases in holding suspended federal employee entitled to de novo judicial review because of biased agency tribunal and lack of opportunity for discovery). I realize, too, that unless government-contractors are safeguarded statutorily against unfair or erroneous agency release of valuable business information, a problem of constitutional dimensions must be faced, and that I must

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however, for any general exploration or dissertation on that subject. For whatever "adequacy" at its broadest may require, it is clear enough to me that in one critical respect it was lacking here, and accordingly that the District Court was empowered by the APA to engage de novo in such factfinding as a preliminary assessment of the companies' exemption claims necessitated.[107]

I start with the "fundamental proposition of administrative law that interested parties must have an effective chance to respond to crucial facts."[108] This precept finds expression in the familiar requirement of notice of contemplated agency action and opportunity to be heard,[109] and

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106 *(Continued)*
construe the APA in that light. *United States v. Clark*, 445 U.S. 23, 27, 100 S.Ct. 895, 899-900, 63 L.Ed.2d 171, 177 (1980) (court will not pass on constitutionality of federal statute if a particular construction possibly can avoid the constitutional question); *Califano v. Yamasaki*, 442 U.S. 682, 693, 99 S.Ct. 2545, 2553, 61 L.Ed.2d 176, 187 (1979)(same); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 & n. 22, 99 S.Ct. 1355, 1364 & n.22, 59 L.Ed.2d 587, 600-601 & n.22 (1979)(policy of "strict necessity" in disposing of constitutional issues); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-750, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141, 1150 (1961)(same). So, while my view on the question at hand rests on statutory grounds, it is usefully informed by constitutional decisions in closely similar situations.

107 See text *supra* at notes 91-94.

108 *Carson Prods. Co. v. Califano, supra* note 106, 594 F.2d at 459.

109 *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14, 98 S.Ct. 1554, 1563, 56 L.Ed.2d 30, 42 (1978), quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950) (notice of termination of utility service inadequate because not " 'reasonably calculated' " to inform customers of opportunity to present objections); *North Alabama Express, Inc. v. United States*, 585 F.2d 783, 786-787 (5th Cir.1978) (failure to provide adequate notice creates jurisdictional defect which invalidates administrative action

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its reach extends to a demand for suitable means of addressing not only the opponent's case but the agency's concerns as well.[110] As the Supreme Court has declared, "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[111] Beyond that, "[a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it."[112] And

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109 *(Continued)*
until cured); *Brandt v. Hickel*, 427 F.2d 53, 56 (9th Cir.1970) (due process requires party adversely affected by agency decision to be afforded proper notice of action to be taken). And see *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647-649, 95 L.Ed. 817, 853-854 (1951) (Frankfurter, J., concurring):

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

110 See cases cited *infra* notes 118-119.

111 *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377, 1390-1391 (1959). See also *Gonzales v. United States*, 348 U.S. 407, 413-414, 75 S.Ct. 409, 412-413, 99 L.Ed. 467, 472 (1955) (petitioner entitled to know thrust of agency's recommendations so he can muster facts and arguments to meet them); *Simmons v. United States*, 348 U.S. 397, 405, 75 S.Ct. 397, 401-402, 99 L.Ed. 453, 459 (1955) (notice of adverse charges essential to basic fairness); *Moore-McCormack Lines v. United States*, 413 F.2d 568, 584-585, 188 Ct.Cl. 644 (1969) (procedural fairness requires that individuals be informed of agency position and have opportunity to respond).

112 *Bowman Transp. v. Arkansas-Best Freight Sys., supra* note 106, 419 U.S. at 288 n. 4, 95 S.Ct. at 443 n. 4, 42 L.Ed. at 457 n. 4.

"[t]hose who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."[113] The opportunity for response must come, of course, " 'at a meaningful time and in a meaningful manner.' "[114]

These principles, so essential to fairness of the proceeding and accuracy of the factfinding process, have already achieved recognition by this court. As far back as 1974, we announced that "[a]n agency may not validly take action against an individual without a hearing unless its notice to the individual of the adverse action proposed to be taken against him specifies the nature of the facts and evidence on which the agency proposes to take action."[115] The reason, we said, is that "[s]uch notice enables the affected party to prepare an informed response which places all the relevant data before the agency."[116] Much more

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[113] *Morgan v. United States,* 304 U.S. 1, 18-19, 58 S.Ct. 773, 776, 82 L.Ed. 1129, 1132-1133 (1938). See also *Del Laboratories, Inc. v. United States, supra* note 106, 86 F.R.D. at 680-682; *Zotos Int'l, Inc. v. Kennedy, supra* note 106, 460 F.Supp. at 274-279. Compare *Carson Prods. Co. v. Califano, supra* note 106, 594 F.2d at 457-459.

[114] *Carson Prods. Co. v. Califano, supra* note 106, 594 F.2d at 459, quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965). See also *Fuentes v. Shevin,* 407 U.S. 67, 81, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556, 570 (1972) (notice and hearing must be afforded while deprivation still avoidable); *Bell v. Burson,* 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90, 96 (1971) (hearing which excludes consideration of essential element not "meaningful"); *Boddie v. Connecticut,* 401 U.S. 371, 378-379, 91 S.Ct. 780, 786-787, 28 L.Ed.2d 113, 119-120 (1971).

[115] *Hess & Clark, Div. of Rhodia, Inc. v. FDA,* 161 U.S.App.D.C. 395, 403, 495 F.2d 975, 983 (1974).

[116] *Id.*

recently, we affirmed, without comment,[117] a District Court ruling articulating the proposition that "[w]here no 'hearing' of any type is required by statute, procedural fairness demands that plaintiffs be informed of the [agency's] position on [an] issue and have an opportunity to respond to [the agency's] contentions before the issuance of a final determination on the issue."[118] Other decisions of the court are of similar effect.[119]

In the litigation at bar, the principal question before OFCCP was the applicability of FOIA's Exemption 4, which ushered in centrally a test distinctly factual in nature: whether disclosure of the sought-after data likely would beget substantial harm to the companies' competitive positions.[120] The agency's regulations confined

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[117] *Aeron Marine Shipping Co. v. United States,* 224 U.S.App.D.C. 373, 379, 695 F.2d 567, 573 (1982).

[118] *Aeron Marine Shipping Co. v. United States,* 525 F.Supp. 527, 534 (1981), quoting *Moore-McCormack Lines, Inc. v. United States, supra* note 111, 413 F.2d at 584, *aff'd in part and rev'd in part, Aeron Marine Shipping Co. v. United States, supra* note 117 (citation omitted).

[119] *American Cyanamid Co. v. FDA,* 196 U.S. App.D.C. 400, 406-407, 606 F.2d 1307, 1313-1314 (1979) (unsuccessful applicant for product approval must be given notice of safety standards and ways it failed to meet them); *USV Pharmaceutical Corp. v. Secretary of HEW,* 151 U.S.App.D.C. 284, 290, 466 F.2d 455, 461 (1972) (agency must, before calling upon litigant for additional evidence, establish right to a hearing, state facts and reasons showing at least prima facie that evidence before agency raised no material factual issue justifying hearing). See *Zotos Int'l, Inc. v. Kennedy, supra* note 106, 460 F.Supp. at 276, holding, in the due process context, that a litigant must have " the means of engaging in a reasonably focused dialogue with the agency concerning the major issues in contention." See also *Ralpho v. Bell, supra* note 106, 186 U.S.App.D.C. at 389-390, 569 F.2d at 628-629; *American & European Agencies v. Gilliland, supra* note 106, 101 U.S.App.D.C. at 106, 247 F.2d at 97.

[120] See note 97 *supra* and accompanying text.

the companies, in their efforts to establish just such a threat, to written specifications of reasons for confidential treatment.[121] The companies put forward lengthy and detailed written statements in support of their position,[122] only to learn in the end that overwhelmingly their efforts were unsuccessful.[123]

Neither the agency's regulations nor its procedures offered the companies any guidance in focusing their presentations or documentation[124] and, for much of the

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[121] 41 C.F.R. § 60-60.4(d) (1983). See also text *supra* at notes 101-105.

[122] Before ICS, Metropolitan and Prudential submitted memoranda totaling more than 100 pages. Brief for NOW at 8 & n. 11. On appeal to OFCCP, Metropolitan filed a 17-page letter, with over 400 pages of supporting documents. See J.App. 280; Brief for NOW at 10 & n. 14. Hancock similarly filed a lengthy letter of appeal buttressed by an expert's affidavit. See J.App. 334 (OFCCP reference to affidavit submitted by Hancock).

[123] See text *supra* at notes 29-34.

[124] We recently held that submitters of information to the Environmental Protection Agency (EPA) are sufficiently safeguarded from unfair and faulty factfinding by EPA's normal method of processing confidentiality claims. *Worthington Compressors, Inc. v. Costle, supra* note 55, 213 U.S.App.D.C. at 209 n. 48, 662 F.2d at 54 n. 48. EPA's regulations, unlike those of OFCCP, articulate a carefully-crafted plan for resolving such disputes as may arise, and supply the agency with substantive guidelines as well as intricately detailed procedures. See 40 C.F.R. §§ 2.100-2.309 (1983). The EPA scheme provides submitters of allegedly confidential material with two basic procedural entitlements completely lacking in the OFCCP offering. One is a notice of proposed agency deliberation on the matter of confidentiality, which identifies specific, prescribed points to be addressed in comments, see *id.* § 2.204(e)(4); the other is opportunity to respond to agency concerns before a final decision is made, see *id.* § 2.205(b). Our sanction of EPA's system, therefore, does not call for automatic approval of the skeletal framework comprising OFCCP's counterpart. Compare *id.* §§ 2.203-2.215 with 41 C.F.R. § 60-60.4 (1983).

material implicated, the companies became aware of the agency's objections to their claims only after the agency's final decision to disclose.[125] Indeed, in two of the three cases at bar, the second-level administrative decisionmaker not only denied the companies' confidentiality requests but also, in several instances, decreed the release of data which the first-level decisionmaker had ordered withheld.[126] And while, of course, the findings and reasons advanced in support of the first-level administrative decision are open to attack on administrative appeal, OFCCP regulations provide no mechanism for combatting the findings and reasons assigned in an adverse second-level decision–the all-important "final determination" of the agency.[127] Put another way, the companies had no opportunity whatsoever to learn the final decisionmaker's concerns, much less to address them.

I would hold, then, that the factfinding procedures in vogue when OFCCP undertook to resolve the companies' FOIA-exemption claims were too meager to survive the test of adequacy. It follows that the District Court, in assessing those claims provisionally on the companies' preliminary injunctive motion, did not err when it engaged in de novo factfinding. With the agency's own factfinding methodology inadequate, that course was fully authorized by the APA;[128] more importantly, it ensured fulfillment of the statutory pledge of adequate factfinding[129] in the only way possible without change in the agency's procedures responsive to the principles I have explicated.

It does not follow, however, that the same course

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[125] See text *supra* at note 34.

[126] See J.App. 326 (Metropolitan), 336 (Hancock).

[127] See 41 C.F.R. § 60-60.4(d) (1983); text *supra* at notes 102-104.

[128] See text *supra* at notes 91-94.

[129] See text *supra* at notes 106-119.

is indicated ineluctably when the District Court reaches these cases on the merits. An adequate factfinding process must, of course, be afforded at some point, but, with the agency's factfinding machinery sufficiently improved, that could be done at the administrative level; and in that event de novo judicial review of the agency's exemption-related factual determinations would lose the legal foundation it now has.[130] Judicial review would then be confined to the administrative record,[131] and the agency's exemption rulings would be vulnerable only if arbitrary, capricious, abusive of discretion or otherwise contrary to law.[132]

So, whether the factfinding essential on exemption claims properly is to take place before the agency or the court depends upon the caliber of the procedures the agency is prepared to extend. And just what an agency will offer in this regard is basically a matter of policy– generically legislative, but usually administrative – which is neither a court's function nor prerogative to prescribe.[133] Congress has, of course, established a policy for cases generally by providing for de novo judicial review in those instances where agency adjudicative factfinding procedures are entirely lacking or seriously infirm.[134] But an agency can totally eliminate the alternative of de novo review by providing adequate factfinding mechanisms, or elevating those it may have to a legally acceptable level.

It may well be more desirable, from the perspective of both the administrative process and the judicial system,

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[130] See text *supra* at notes 74-81, 115-119.

[131] See text *supra* at note 71.

[132] See 5 U.S.C. § 706(2)(A) (1982).

[133] *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 543-545, 98 S.Ct. 1197, 1211-1212, 55 L.Ed.2d 460, 479-480 (1978).

[134] See text *supra* at notes 91-94.

for the agency, rather than the court, to function as the primary factfinder in reverse-FOIA cases. Not the least of the considerations relevant is that Congress has not specifically designated the forum for such factfinding,[135] and there is reason to doubt that, were it ever to do so, its designee would be the court.[136] At any rate, the choice presently is one for the agency to make – it is a by-product of the agency's power to set policy on the methodology of its factfinding – and one I am loathe to foreclose. I think an opportunity for an upgrading of OFCCP's factfinding procedures should be afforded before the District Court continues on with de novo exemption-factfinding in its consideration of the merits.

III. RULINGS BY THE DISTRICT COURT

All parties claim error of some kind in the District Court's holdings on the effect of FOIA's exemptions on the parties' respective requests for confidentiality or disclosure of particular items of information. NOW and the Government also contest the court's conclusion that voluntary agency release of FOIA-exempted materials would pervert agency discretion.[137] I now address these contentions, mindful that the single subject of the appeals before us is an order disposing of a motion for a preliminary injunction, and advertent to the legal principles thus brought

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[135] FOIA, from its very beginning, has expressly required claims of those requesting disclosure to be heard de novo in district courts. Pub.L.No. 90-23, 81 Stat. 54, 55 (1967), codified at 5 U.S.C. § 552(a)(4)(B)(1982). But Congress has not legislated specifically on the methodology appropriate when the moving litigant is an information-submitter seeking a ban on disclosure.

[136] See Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits, H.R.Rep. No. 1382, 95th Cong., 2d Sess. 59-63 (1978) (discussing scope of judicial review in reverse-FOIA cases).

[137] See text *supra* at notes 55-56.

into play. In ruling on a motion for relief of that character, a court does not reach final determinations on the merits, but "exercise[s] its discretion 'upon the basis of a series of estimates:' "[138] whether the movant likely will prevail on the merits, whether he will suffer irreparable harm without interim relief, whether others will be injured by an award of such relief, and whether the public interest will be advanced or disserved by grant or denial of the motion.[139] Thus, absent improper procedure or an erroneous application of the law, the decision respecting a preliminary injunction lies within the sound discretion of the trial court, and will be reversed on appeal only for abuse of that discretion.[140]

Applying this obviously narrow standard of review, I perceive no basis for upsetting the various assessments, as matters of probability, underlying the District Court's rulings that particular informational items probably would ultimately be found exempt from mandatory disclosure while others would not be. Much less is there ground for

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[138] *Industrial Bank v. Tobriner, supra* note 62, 132 U.S.App.D.C. at 54, 405 F.2d at 1324, quoting *Perry v. Perry,* 88 U.S.App.D.C. 337, 338, 190 F.2d 601, 602 (1951), in turn quoting *Communist Party v. McGrath,* 96 F.Supp. 47, 48 (D.D.C. 1951).

[139] *In re Permanent Surface Mining Regulation Litig.,* 199 U.S.App.D.C. 225, 226, 617 F.2d 807, 808 (1980); *Jacksonville Port Auth. v. Adams,* 181 U.S.App.D.C. 175, 180, 556 F.2d 52, 57 (1977); *Quaker Action Group v. Hickel,* 137 U.S.App.D.C. 176, 181, 421 F.2d 1111, 1116 (1969); *Industrial Bank v. Tobriner, supra* note 62, 132 U.S.App.D.C. at 54, 405 F.2d at 1324.

[140] *Deckert v. Independence Shares Corp.,* 311 U.S. 282. 290, 61 S.Ct. 229, 234, 85 L.Ed. 189, 195 (1940), citing *Prendergast v. New York Tel. Co.,* 262 U.S. 43, 50-51, 43 S.Ct. 466, 469, 67 L.Ed. 853, 858 (1923); *In re Permanent Surface Mining Regulation Litig., supra* note 139, 199 U.S.App.D.C. at 226, 617 F.2d at 809; *Delaware & Hudson Ry. v. United Transp. Union,* 146 U.S.App.D.C. 142, 158, 450 F.2d 603, 619, *cert. denied,* 403 U.S. 911, 91 S.Ct. 2209, 29 L.Ed. 2d 689 (1971).

disturbing the weights the court assigned to the presence or absence of harm from the grant or denial of injunctive relief.[141] Indeed, I view only one challenge as worthy of discussion: that the court erred in holding that voluntary agency release of information the court thought likely to be FOIA-exempt would constitute an abuse of discretion. Because that thesis questions the procedure the court followed in settling on that aspect of the injunction, it merits attention at this stage of the litigation.

After concluding that the companies had demonstrated a substantial probability of prevailing on the merits of some of their exemption claim, the District Court correctly observed that, so far as FOIA is concerned, exempt data might nevertheless be divulged in the sound exercise of agency discretion.[142] The court then proceeded, however, to consider whether in any instance OFCCP had abused that discretion by deciding to unveil such material, and concluded that it had.[143] NOW and the Government assail this approach as a usurpation of the agency's prerogative to make determinations on voluntary release in the first instance.

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[141] Nor do I perceive any prejudicial error in related procedural rulings. During the hearing in the District Court, NOW insisted upon release of the data at issue in their entirety. On this ground, the court refused to permit counsel for NOW to cross-examine witnesses in an effort to show that withholding of only portions of the disputed material would eliminate the alleged injury to the insurance companies and their employees, and NOW attacks this restriction. See Brief for NOW at 42-44. Since counsel for the Government-NOW's ally in the litigation was permitted to pursue this line of questioning, and did in fact do so, I discern no harm flowing from the court's ruling. Nor do I find error in NOW's other challenges. See Brief for NOW at 45-49.

[142] *Metropolitan Life Ins. Co. v. Usery, supra* note 2, 426 F.Supp. at 170-72.

[143] *Id.* at 170-171.

The District Court based its abuse-of-discretion rulings on two grounds. First, it held that voluntary disclosure of much of the information which the court deemed probably exempt from mandatory disclosure under FOIA would constitute a criminal offense under the Trade Secrets Act.[144] Second, though perceiving that OFCCP "never reached the question of discretionary disclosure of the data," [145] the court felt that "failure to exercise any discretion, and the resulting failure to engage in any meaningful consideration of this question, constitutes an abuse of that discretion."[146]

The District Court was right in its conclusion that any voluntary agency disclosure of information exempted by FOIA but intercepted by the Trade Secrets Act would constitute a serious abuse of agency discretion.[147] I cannot say that the court exceeded the bounds of its own discretion in estimating that some FOIA-exempt material which OFCCP proposed to release fell within the purview of the Trade Secrets Act.[148] There were, however, exempt items beyond the reach of that legislation,[149] and I cannot approve the decisional course the court took with respect to them.

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[144] *Id.* at 170.

[145] *Id.* at 171.

[146] *Id.*

[147] See *Chrysler Corp. v. Brown, supra* note 55, 441 U.S. at 318, 91 S.Ct. at 1726, 60 L.Ed.2d at 235; *Charles River Park "A", Inc. v. HUD, supra* note 55, 171 U.S.App.D.C. at 293, 519 F.2d at 942.

[148] See *Metropolitan Life Ins. Co. v. Usery, supra* note 2, 426 F.Supp. at 170.

[149] See *id.* at 170-171. I speak, of course, of information shielded from mandatory disclosure by Exemption 6, not that so immunized by Exemption 4 and removed by the Trade Secrets Act from the area of discretionary release.

As the District Court divined, OFCCP apparently found all data it planned to divulge to be subject to compulsory release under FOIA. Consequently, it seems that OFCCP never reached the question whether material neither exempted by FOIA nor protected by the Trade Secrets Act should be unveiled in the public interest. An agency need never ponder the propriety of voluntarily disclosing information it believes to be mandatorily disclosable under FOIA;[150] only if it is first determined that the information is FOIA-exempt is there any occasion to consider whether release nonetheless is appropriate as a matter of agency policy or discretion.

Furthermore, not until the agency passes on voluntary disclosure, or improperly refuses to do so, should the court act.[151] Questions of voluntary administrative action, by definition, are for the agency, not the court, at least in the first instance; the role of the court is merely to ensure that the agency action was not arbitrary or otherwise contrary to law.[152] Moreover, that determination, we have said, ordinarily is to be made solely on the administrative record,[153] and here there was none on voluntary release.

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[150] See *Chrysler Corp. v. Brown, supra* note 55, 441 U.S. at 291-294, 99 S.Ct. at 1712-1714, 60 L.Ed.2d at 218-220; *Charles River Park "A", Inc. v. HUD, supra* note 55, 171 U.S.App.D.C. at 292-293, 519 F.2d at 940-941.

[151] *Charles River Park "A", Inc. v. HUD, supra* note 55, 171 U.S.App.D.C. at 294, 519 F.2d at 943; *General Motors Corp. v. Marshall, supra* note 72, 654 F.2d at 299.

[152] 5 U.S.C. § 706 (2)(A)(1982); *Charles River Park "A", Inc. v. HUD, supra* note 55, 171 U.S.App.D.C. at 294, 519 F.2d at 943; *NBC, Inc. v. FCC*, 170 U.S.App.D.C. 173, 194, 516 F.2d 1101, 1122 (1974), *cert. denied sub nom. Media Inc. v. NBC*, 424 U.S. 910, 96 S.Ct. 1105, 47 L.Ed.2d 313 (1976); *Brawner Bldg., Inc. v. Shehyn*, 143 U.S.App.D.C. 125, 130, 442 F.2d 847, 852 (1971).

[153] *Charles River Park "A", Inc. v. HUD, supra* note 55, 171 U.S.App.D.C. at 294, 519 F.2d at 943; see also *Chrysler Corp. v. Brown, supra* note 55, 441 U.S. at 318, 99 S.Ct. at 1726, 60 L.Ed.2d at 235.

The District Court should not have undertaken any adjudication on that subject before the agency entrusted with policymaking and decisionmaking powers in the area had occasion to do so.

IV. CONCLUSION

For the reasons stated, I would remand the appealed phases of these cases to the District Court with instructions to remand in turn to OFCCP the question of release of information exempt under FOIA but unaffected by the Trade Secrets Act. I would further instruct the court to afford OFCCP an opportunity to revise its fact-finding procedures in such manner as it may desire. I would affirm the District Court's rulings in all other respects, and let the preliminary injunction remain in force subject to the court's further order. This disposition of these appeals, of course, would leave the parties at liberty to litigate the merits fully, free of any preclusion or limitation by the determinations leading to that injunction.[154]

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[154] "The decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute the law of the case for the purposes of further proceedings and does not limit or preclude the parties from litigating the merits, unless there has been an order of consolidation pursuant to [Fed.R.Civ.P.] Rule 65(a)(2). . . ." *Berrigan v. Sigler*, 162 U.S.App.D.C. 378, 382, 499 F.2d 514, 518 (1974) (footnotes omitted). See also *Industrial Bank v. Tobriner*, *supra* note 62, 132 U.S.App.D.C. at 54, 405 F.2d at 1324.

MIKVA, Circuit Judge, and McGOWAN, Senior Circuit Judge, concurring:

[1,2] We concur in the result in this case, namely, affirmance of the preliminary injunction and remand to the District Court with instructions for further proceedings. We do not agree, however, with Chief Judge Robinson's reasons for affirming the preliminary injunction, and we see differently what should transpire upon remand to the District Court. In our view, de novo review in the District Court was inappropriate upon motion for preliminary injunction; such review also would be inappropriate at the trial on the merits; and no new or different procedures should be required of the agency. We uphold the preliminary injunction on other grounds, however, and our instructions to the District Court differ somewhat from those of the Chief Judge.

FOIA provides for de novo review by the district court of the question of statutory exemption from disclosure, but the FOIA right of action extends only to those who request disclosure. *See* 5 U.S.C. § 552(a)(4)(B) (1982). Because the submitter of information has no right of action under FOIA to enjoin disclosure, *see Chrysler Corp. v. Brown*, 441 U.S. 281, 290-94, 99 S.Ct. 1705, 1711-13, 60 L.Ed.2d 208 (1979), the de novo review section of that act is not available to submitters. Indeed, when the Administrative Conference of the United States surveyed the law regarding submitters' rights, it concluded that it would take an amendment of current law for submitters ever to have de novo review available to them, and the Conference recommended that Congress enact such amendments. *See* 1 C.F.R. § 305.82-1 (1983) (ACUS recommendation regarding submitters' rights under FOIA).

[3] *Chrysler Corp. v. Brown*, 441 U.S. at 317-18, 99 S.Ct. at 1725-26, makes it clear that an information-submitter's right to judicial review of an agency's decision to disclose submitted records arises under the APA. Upon

this point we are in agreement with Chief Judge Robinson. We differ as to the nature of the APA review available in this case.

In all cases challenging agency action under the APA, the "action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971) (quoting 5 U.S.C. § 706(2)(A) and citing *id.* § 706(2)(B)-(D)). The "focal point for judicial review" in such cases "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973) (per curiam). *See also United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715, 83 S.Ct. 1409, 1413, 10 L.Ed.2d 652 (1963) ("in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, . . . consideration is to be confined to the administrative record and . . . no *de novo* proceeding may be held").

The APA contemplates de novo review of the agency action only when "the facts are subject to trial de novo by the reviewing court," 5 U.S.C. § 706(2)(F) (1982). It would appear, therefore, that something other than the APA must make the facts "subject to trial de novo," but the Supreme Court has interpreted section 706(2)(F) to allow a reviewing court to create its own record when the agency's factfinding procedures are inadequate. *See Camp v. Pitts*, 411 U.S. at 141-42, 93 S.Ct. at 1243-44; *Overton Park*, 401 U.S. at 415, 91 S.Ct. at 823. *See also Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 839 n. 39 (noting exception), 839-42 (rejecting de novo review) (D.C.Cir.1976) (Robinson, J.). Chief Judge Robinson finds that OFCCP's procedures were inadequate, and he rests

his conclusions in part II of his opinion on that finding. We cannot agree.

The two seminal Supreme Court cases do not tell us what would make agency procedures inadequate; in neither *Camp v. Pitts* nor *Overton Park* were inadequacies found. Chief Judge Robinson has cited only one case holding agency factfinding procedures so deficient that de novo review under section 706(2)(F) was warranted, *see Porter v. Califano*, 592 F.2d 770, 782-83 (5th Cir.1979), *cited supra* at 738 n. 106, and that case involved substantial bias in an agency disciplinary proceeding. We have found no others. We can only conclude that the procedures must be severely defective before a court proceeding under the APA can substitute de novo review for review of the agency's record. *Cf. Upjohn Manufacturing Co. v. Schweiker*, 681 F.2d 480, 483 (6th Cir.1982) (if not provided by statute, de novo review "is the exception rather than the rule"). This is not such a case.

Under the regulations we are reviewing, the submitter is informed that his materials may be disclosed if he makes no claim of exemption. He is told to whom to claim exemption, he is allowed to submit any materials he wishes to support that claim, and he is allowed to appeal the initial decision, again with extensive documentation and written argument. *See* 41 C.F.R. §§ 60-40.3(a), 60-60.4(d) (1983). These procedures were followed in this case, and they provide notice and the opportunity to present relevant evidence at a relevant time to responsible agency officials. Moreover, although the regulations require prompt administrative action, the time limits were stretched in this case. That circumstance, and the fact that both administrative tiers produced lengthy decisions, suggest that the decision makers were not totally oblivious of the companies' objections.

Chief Judge Robinson argues that "[n]either the agency's regulations nor its procedures offered the compa-

nies any guidance in focusing their presentations or documentation," *supra* at 740. The first-level decision maker, however, wrote at length to support his conclusion that most of the materials are exempt from disclosure. Surely that explanation provided some focus for the companies' appeal to the second-level decision maker.

He is also troubled by the fact that the second tier of review found additional materials non-exempt and that there was no administrative appeal from that decision available. *See supra* at 741. This hardly proves the procedures to be inadequate. Agency adjudication must become final at some point, and after that point aggrieved parties can resort to the courts. If the agency has not rationally supported its decision or has exceeded its lawful authority, the court can remand for further proceedings or reverse the agency outright. If the admininstrative record is inadequate for judicial review, the court can require supplementation by the agency in a variety of ways. *See Camp v. Pitts*, 411 U.S. at 142-43, 93 S.Ct. at 1244; *Overton Park*, 401 U.S. at 420-21, 91 S.Ct. at 825-26.

Finally, although an oral hearing might have facilitated the companies' presentations, the absence of such a hearing does not render the procedures inadequate, for the procedures in *Camp v. Pitts* were found adequate without having provided such a hearing, *see* 411 U.S. at 138-40, 93 S.Ct. at 1243. *See also, e.g., P & B Services, Inc. v. Cardenas*, 525 F.Supp. 1289, 1292-93 & n. 16 (D.D.C. 1981) (no oral hearing, but procedures adequate).

In short, although we might not describe the agency's procedures as being the most effective or open, they were not closed, unfair, or otherwise inadequate to the task of developing a factual record, as well as a record of submitters' objections, based upon which one could decide rationally whether material is exempt from disclosure. *Cf. Upjohn*, 681 F.2d at 483 (prescribed procedures were followed and adequate, even if informal). For this reason, we

disagree with Chief Judge Robinson's conclusion that de novo review was proper here under the APA.

Our conclusion that the District Court erred in not conducting its review based solely on the record that was before the OFCCP normally would lead us to vacate the court's actions and remand to the District Court. Under the circumstances of this case, however, we find it appropriate to affirm the preliminary injunction. Our own review of the administrative record convinces us that it would have been well within the discretion of the District Court for it to have granted preliminary relief even had it confined its review to that record. Rather than delay further by remanding for the District Court to rehash the issues of a preliminary injunction, we will affirm the injunction and remand for further proceedings.

Because we find the agency's factfinding procedures to have been adequate, our conception of the proceedings that should take place upon remand differs from Chief Judge Robinson's. First, it is not necessary for the agency to develop new procedures before this case is allowed to progress. Second, we would leave to the District Court's discretion the timing of any remand to OFCCP.

For example, the court may find it most appropriate to proceed to consider the merits of whether these materials are exempt. To do so, it may need to require OFCCP to supplement the administrative record. *See Camp v. Pitts*, 411 U.S. at 142-43, 93 S.Ct. at 1244; *Overton Park*, 401 U.S. 420-21, 91 S.Ct. at 825-26. Once the District Court has a proper record, if it finds that some or all of the materials are exempt from disclosure, the concerns expressed in part III of Chief Judge Robinson's opinion would become acute. The District Court then would have to remand to OFCCP for the agency to exercise its discretion, with a statement of reasons, regarding disclosure of the material despite exemption.

Of course, upon remand the District Court is also

free to proceed in any other manner it sees fit, consistent with both this opinion and the Supreme Court's decisions in *Camp v. Pitts* and *Overton Park*. We have written separately to emphasize these points: (1) de novo review was inappropriate at the preliminary injunction stage (2) the proper standard of review – at the preliminary stage, when treating the merits of whether the materials are exempt, and when evaluating any agency decision to disclose exempt materials – is provided by 5 U.S.C. § 706(2)(A)-(D) (1982); (3) new agency procedures are not necessary; (4) the District Court may require OFCCP to supplement the record if the record does not now provide a sufficient basis for judicial review.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SEARS, ROEBUCK AND CO.,
Plaintiff,

CHARLES W. DAHM, O.P.,
Intervenor,

v.

JACK ECKERD, *et al.*,
Defendants.

76 C 2444
Judge Rovner

RECEIVED
SEP 8 1987

AGNES GIOCONDA, *et al.*,
Plaintiff,

SEARS, ROEBUCK AND CO.,
Intervenor,

v.

JACK ECKERD, *et al.*,
Defendants.

76 C 4499

JOINT STATUS REPORT

1. Nature Of The Case

This case arises under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"), and involves a determination by the United States General Services Administration ("G.S.A.") to publicly disclose the affirmative action plan of Sears, Roebuck and Co. ("Sears"). Sears, believing that such public disclosure would competitively injure it, filed the instant lawsuit on July 2, 1976 to enjoin disclosure.

On August 27, 1976, this court enjoined G.S.A. from publicly disclosing Sears' documents pending a final deci-

sion on the merits.[1] On appeal, the Seventh Circuit vacated the preliminary injunction and remanded the case to this court for dismissal of the entire complaint. *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197, 1207 (7th Cir. 1978).

Subsequently, Sears petitioned the Supreme Court for a *writ of certiorari*. On April 23, 1979, the Supreme Court granted Sears' petition for *certiorari* and vacated the Seventh Circuit's decision in *Sears v. Eckerd* and remanded the case to the Seventh Circuit in light of the Supreme Court's decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). In *Chrysler v. Brown*, the Supreme Court held that while the FOIA does not independently accord a private right of action to enjoin disclosure, under the Administrative Procedure Act parties submitting documents may seek judicial review of agency action. On June 28, 1979 the Seventh Circuit remanded this case to this court with directions to order the Department of Labor to make a new administrative determination following the mandates of *Chrysler Corp. v. Brown*.

On January 2, 1980, Judge Moran remanded the case to the Department of Labor for further proceedings in accordance with the Administrative Procedure Act. Before initiating further proceedings in this matter, the Department of Labor is waiting for the decision of the Court of Appeals for the District of Columbia in *CNA v. Marshall*,

---

[1] Charles W. Dahm was granted permission to intervene in the federal court action on December 7, 1976. On December 18, 1976, Agnes Gioconda and Nancy Burton, individually and on behalf of all members of the Chicago Chapter for the National Organization for Women, filed suit against the General Services Administration to obtain disclosure of Sears' 1974 and 1976 EEO-1 reports and its affirmative action plans. Sears was subsequently given leave to intervene, and on December 30, 1976 the cases of *Sears, Roebuck & Co. v. Jack Eckerd, et al.*, Case No. 76 C 2444, and *Agnes Gioconda, et al.*, Case No. 76 C 4499, were consolidated.

No. 81-2169. *CNA v. Marshall* will provide the Department of Labor guidance on what procedural devices an agency must provide a party who seeks to prevent disclosure under the FOIA.

Pending the *CNA v. Marshall* decision, this action remains in abeyance until the Department of Labor makes the requisite determinations pursuant to this court's January 2, 1980 remand order.

2. Service Of The Complaint

All parties have been served. No parties have been dismissed.

3. Discovery

A discovery cut-off date has not been set. Discovery has not been completed. The amount of necessary discovery will depend on the type of procedures the Department of Labor decides to adopt.

4. Settlement

No aspects of the case have been stipulated or settled. There is little likelihood of settlement.

5. Outstanding Motions

There are no outstanding motions.

6. Pretrial Conference

A pre-trial conference would be premature at this point.

7. Length of Trial

Counsel estimates a trial will take two or three days. The case is to be tried before the Court.

8. Final Pre-Trial Order

A Final Pre-Trial Order has not been filed, and the case is not ready for trial.

Respectfully submitted,

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Dated: 9/4/87

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Dated: 9/8/87

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WESTINGHOUSE ELECTRIC CORPORATION

FILED
DEC 10, 1982

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania corporation,

Plaintiff,

HAROLD BROWN, SECRETARY U.S. DEPARTMENT OF DEFENSE; LIEUTENANT GENERAL G. T. POST, DIRECTOR DEFENSE LOGISTICS AGENCY; JOSEPH H. CONNOLY, COMMANDER, DEFENSE CONTRACT ADMINISTRATION SERVICES REGION LOS ANGELES; WELDON J. ROUGEAU, DIRECTOR OFFICE OF FEDERAL CONTRACT COMPLIANCE; F. RAY MARSHALL, SECRETARY U.S. DEPARTMENT OF LABOR,

Defendants.

No. 78-3799-LEW

JOINT STATUS REPORT

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania corporation,

Plaintiff,

v.

HAROLD BROWN, SECRETARY U.S. DEPARTMENT OF DEFENSE; LIEUTENANT GENERAL W. W. VAUGHAN, DIRECTOR DEFENSE SUPPLY AGENCY; MICHAEL E. DeARMOND, COMMANDER, DEFENSE CONTRACT ADMINISTRATION SERVICES REGION LOS ANGELES; A. DIANE GRAHAM, ACTING DEPUTY ASSISTANT SECRETARY AND DIRECTOR OFFICE OF FEDERAL CONTRACT COMPLIANCE; F. MARSHALL, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants.

No. 77-0613-LEW

PURSUANT TO THE ORDER OF THE COURT filed on November 24, 1982, the parties plaintiff and defendant in the above-referenced consolidated actions, through their respective counsel of record, hereby submit to the Court the following Joint Status Report.

1. On or about November 8, 1979 the parties entered into a Stipulation, approved by the Court, to remand these consolidated cases to the Department of Labor, Office of Federal Compliance Programs ("OFCCP") for reconsideration of its initial administrative determinations as to the disclosability of the information at issue in these cases in light of the Supreme Court's decision in *Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S.Ct. 1705 (1979). As a part of this Stipulation, the parties agreed, with Court approval, to extend the Temporary Restraining Order issued on February 22, 1977 in Case No. CV 77-0613-LEW and the Temporary Restraining Order issued on November 4, 1978 in Case No. CV 78-3799-LEW through and including the 20th day following receipt by plaintiff of written notice of OFCCP's final determination regarding the disclosability of the information at issue herein. Previously, on March 9, 1979, this Court had ordered that said Temporary Restraining Orders be maintained in effect pending appeal by Westinghouse.

2. On May 23, 1980 OFCCP requested that Westinghouse provide the agency with a written position statement and supporting data on the issue of disclosability of the subject documents. On August 28, 1980 Westinghouse transmitted its position statement to OFCCP pursuant to that request.

3. In connection with its administrative processing of the matter on remand, OFCCP contacted Pedro Carillo and Leighton Johnson, the requesters herein, and they individually indicated their continuing desire for access to the disputed information sought by each of them.

4. Subsequently, action by the Department of Labor on these cases was stayed pending the resolution of the related pending cases in the D. C. Circuit Court of Appeals described below. As will be clear, the potential effect of these appellate cases on the administrative proceedings in the Department of Labor has necessitated that the issues raised therein be resolved prior to final agency action in the instant cases.

5. On October 29, 1979, the U.S. Court of Appeals for the District of Columbia Circuit took action in a number of "reverse-FOIA" cases affected by the Supreme Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. 281(1979). While remanding several of these cases to the agencies from which they had arisen, the court retained for decision a case involving disclosure of affirmative action materials under Executive Order 11246, *National Organization for Women* v. *Usery*, No. 76-2119. That case presents for potential decision several significant substantive issues left undecided by the Supreme Court in *Chrysler* which are key legal questions presented to the agency in the present cases. These questions include whether the Trade Secrets Act, 18 U.S.C. 1905, is an exempting statute encompassed within FOIA Exemption 3, 5 U.S.C. 552(b) (3), and whether information which an agency finds to be outside Exemption 4 of the FOIA may be disclosed to the public irrespective of the Trade Secrets Act. *National Organization for Women* was argued before the Court of Appeals on May 1, 1980. A decision has not yet been entered.

6. On November 28, 1980 the Department of Labor entered its first, and as yet only, decision in the several remanded "reverse-FOIA" cases involving affirmative action materials, styled *Matter of CNA Financial Corporation*, reported at 24 BNA Fair Emp. Prac. Cases 877. That decision resulted in litigation presently pending in the U.S. Court of Appeals of the District of Columbia Circuit, *CNA Financial Corp.* v. *Donovan*, No. 81-2169,

which also presents questions of importance to the administrative proceedings in the present cases. These issues include whether the procedures by which the Department of Labor has initially conducted the remand cases comport with due process. In the remand proceedings, the Department has permitted submitters of information contained in documents at issue to submit written materials of any kind to establish or substantiate claims that they contain confidential commercial information; however, the Department has declined to conduct oral hearings or more formal hearings under § 554 of the Administrative Procedure Act. The District Court in *CNA* upheld the Department of Labor's procedures against the due process challenge of plaintiffs in that case and sustained its decision on the merits under judicial review pursuant to § 706 of the Administrative Procedure Act. (The district court opinions in that case can be provided to the Court if the Court so chooses.) However, on appeal each of these decisions is challenged, and a decision in that case may affect the course which the Department of Labor has followed thus far in the remanded cases. Appeal in the *CNA Financial Corp.* case was ordered expedited by the D.C. Circuit; briefing and oral argument were completed on December 4, 1981. In view of the pendency of issues of such importance to the administrative proceedings in all of the remanded cases pending before the agency, the Department of Labor has stayed decision in these cases.

7. While not binding on this Court, the Court may wish to know that similar reports were made to other District Courts (Judge Sirica in *Exxon Corp.* v. *Marshall*, Civil No. 77-0812 (USDC-DDC) and consolidated cases; Judge Moran in *Sears, Roebuck & Co.* v. *Eckerd*, No. 76-C-2444 (N.D. Ill.)). In both instances, the District Courts accepted that further administrative proceedings would be postponed until the D.C. Circuit issues are decided.

DATED: This 10th day of December, 1982

/s/ KYLE D. BROWN
KYLE D. BROWN
HILL, FARRER & BURRILL
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DATED: This 10th day of December, 1982

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FILED
NOV 20, 1987

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation,
Plaintiff,

v.

HAROLD BROWN, Secretary, Dept. of Defense, et al.,
Defendants.

No. CV 78-3799-LEW

JOINT STATUS REPORT

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation,
Plaintiff,

v.

HAROLD BROWN, Secretary, U.S. Dept. of Defense, et al.,
Defendants.

No. CV 77-0613-LEW

Pursuant to the Court's Minute Order of May 1, 1985, and the Court's oral order at the Status Conference on January 5, 1987, the plaintiffs and federal defendants in the above-referenced consolidated actions, through their undersigned counsel, hereby submit the following Joint Status Report.

1. The procedural history of the two actions which were consolidated by the District Court can be found in the District Court's Findings of Fact and Conclusions of Law filed on April 13, 1979. The extent to which the District Court found in the defendants' favor can be ascertained in reading those findings of Fact and Conclusions of Law. Notwithstanding the District Court's ruling, a stipulation and order was filed on November 13, 1979, remanding these cases to the Office of Federal Contract Compliance Programs (OFCCP) for reconsideration of the disclosability of the information at issue herein in light of the decision of the United States Supreme Court in *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979).

2. Since 1979, a memorandum and numerous joint status reports to the Court have been filed, informing the Court of the status of these cases. Since 1983, the plaintiffs and federal defendants urged the Court to permit the OFCCP to await the decision of the D.C. Circuit in the two cases (*National Organization for Women v. SSA*, No. 76-2119 ["NOW"] and *CNA Financial Corp. v. Donovan*, No. 81-2169 ["CNA"] described in the December 10, 1982 Joint Status Report, prior to rendering a decision on reconsideration herein. The Court accepted the recommendation of the parties. The Court will recall that in the Joint Status Report of July 6, 1984, the parties reported the D.C. Circuit's issuance of the *NOW* decision on May 25, 1984 and continued to urge the Court to await the D.C. decision in *CNA*. The Court then accepted the recommendation of the parties.

3. The D.C. Circuit decided *CNA Financial Corp. v. Donovan*, No. 81-2169, on September 29, 1987. However, CNA filed a petition for rehearing on November 13, 1987. The mandate in *CNA* has been stayed pending such a petition for rehearing. In addition, CNA is considering filing a petition for certiorari. At this time, it has not been determined whether or not OFCCP will proceed to consider and decide the backlog of remanded cases (including these two actions) which had been awaiting the decision in *CNA*.

4. Counsel for the federal defendants will be out of the state on December 7, 1987, the date currently scheduled for the next Status Conference. If the Court wishes to have counsel present to discuss the status of these cases, counsel respectfully recommend that the Status Conference be continued to December 21, 1987 at 1:30 p.m. or to a date convenient to the Court in January.

DATED: This 19th day of November, 1987.

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DATED: This 19th day of November, 1987.

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(3)

Supreme Court, U.S.
FILED
FEB 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1987

CNA FINANCIAL CORPORATION, CONTINENTAL ASSURANCE COMPANY, and CONTINENTAL CASUALTY COMPANY,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and DIRECTOR OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF SEARS, ROEBUCK AND CO. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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NO. 87-1159

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

CNA FINANCIAL CORPORATION,
CONTINENTAL ASSURANCE COMPANY,
and CONTINENTAL CASUALTY COMPANY,

Petitioners,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF LABOR and DIRECTOR
OF THE OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS OF THE UNITED
STATES DEPARTMENT OF LABOR,

Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF SEARS, ROEBUCK AND CO. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE[1]

Sears, Roebuck and Co. ("Sears") files this brief amicus curiae to present its views regard-

1 This brief is filed with the written consent of all parties in accordance with Rule 36.1 of the Court.

ing a case which will significantly affect the administration of the Freedom of Information Act, 5 U.S.C. § 552 et seq. ("FOIA") and the rights of federal contractors who are required to submit confidential business data to the government pursuant to Executive Order 11246.

Sears is the largest retailer in the United States. As a government contractor, Sears, like petitioner CNA, is required to comply with Executive Order 11246. The regulations promulgated thereunder require Sears to submit equal employment opportunity (commonly known as "EEO-1") reports, as well as maintain and provide on request, written affirmative action programs for each of its facilities nationwide. This information can significantly aid its competitors in gauging Sears' business plans, including its entry into or withdrawal from markets. Sears, therefore, has a substantial interest in the procedural rights accorded to submitters of confidential business data to the

government when public disclosure of such valuable property is sought under the FOIA.

Sears' interest in the resolution of the legal issues raised by petitioner is underscored by its own participation[2] as a party to three reverse-FOIA actions presenting exactly the same issues. Sears, Roebuck and Co. v. General Services Administration, et al., Case No. 2149-73 (D.D.C.), pending since 1973, was filed when the General Services Administration decided to release, over Sears' objections, EEO-1 reports and affirmative action plans for nineteen major Sears retail units, its New York buying offices, and Sears' corporate headquarters. Sears, Roebuck and Co. v. Jack Eckerd, et al., Case No. 76 C 2444 (N.D. Ill.), pending

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2 The data Sears provides to the government includes detailed narrative and statistical information regarding staffing, pay scales, and changes in employment at each unit. The data also includes information concerning the number of present employees and future goals and timetables that have been established to increase the number of females and minorities in Sears' workforce.

since 1976, was filed when the Office of Federal Contract Compliance Programs ("OFCCP") decided to release, over Sears' objections, affirmative action plans and EEO-1 reports covering Sears' corporate headquarters. Agnes Gioconda, et al. v. Jack Eckerd, et al., Case No. 76 C 4499 (N.D. Ill), a case in which Sears was given leave to intervene and which was consolidated with Sears v. Eckerd, was filed in 1976 to obtain disclosure of certain Sears EEO-1 reports and affirmative action plans. Because Sears and the government have expected the instant case to provide needed guidance on the procedural and substantive issues presented, each of the Sears cases has been held in abeyance at the district court or agency level awaiting resolution of the instant case.

The interest of Sears, therefore, in filing this brief amicus curiae urging that the petition for writ of certiorari be granted, is based on the substantial and far reaching consequences

that the resolution of the instant case will have on Sears and American business in general.

REASONS FOR GRANTING THE WRIT

1. The Court's decision in Chrysler Corporation v. Brown, 441 U.S. 281 (1979), was a milestone in reverse-FOIA law because it identified the form of action to be utilized by submitters of information who, like Sears, seek to protect their valuable business data from public disclosure. However, as CNA demonstrated in its Petition, Chrysler's failure to answer other critical questions has left both businesses that submit data to the government and government agencies who are called on to respond to FOIA disclosure requests without needed guidance as to what substantive standards and procedural protections are to be applied in the reverse-FOIA context. Businesses and agencies do not know whether they are receiving or according sufficient due process to submitters at the agency level. Nor do they know whether agency

action will or should be reviewed by the courts on a de novo basis. In addition, enormous uncertainty exists among large and small businesses as to the relative scope of FOIA Exceptions 3 and 4 (5 U.S.C. § 552(b)(3) and (4)) and the Trade Secrets Act, 18 U.S.C. § 1905.

Review is warranted by this Court because, as discussed at pages 3-4, supra, since 1981, for both submitters and the government, this case served as the vehicle for resolving the key reverse-FOIA issues left open in Chrysler. As CNA aptly stresses in its Petition, Sears and other employers have waited nearly six years for a decision in the instant case. During that period, the development of reverse-FOIA law has been frozen. Cases that would normally have percolated up to the courts of appeals and this Court have not done so because, like Sears' cases, they have been effectively stayed pending resolution of the present case. This case presents all of the fundamental issues that employers, agencies and the lower courts have

struggled with since Chrysler. Resolution of the issues raised by this case will, therefore, provide a needed vehicle for providing long overdue guidance on those issues. The petition, therefore, should be granted.

2. The court of appeals' conclusion in this case and in National Organization for Women v. Social Security Administration ("NOW"), 736 F.2d 727, 745 (D.C. Cir. 1984), that de novo review of agency action in a reverse-FOIA case is available only when agency procedures are "severely defective" will, in effect, preclude all judicial review of agency decisions to disclose confidential business data. Coupled with its finding that the astoundingly meager process accorded CNA in this case was not "severely defective," it is unrealistic to view the court of appeals' decision as anything but the elimination of de novo judicial review in a reverse-FOIA case.

The OFCCP and agencies like it have no expertise by which to measure the substantiality

of the competitive harm to result from "public" disclosure of business plans formulated after the enormous expenditure of time and money.[3] Submitters know this, requesters know this, and the agencies know this. In the instant case, the OFCCP had to purchase its expertise from outside. In NOW, however, there was no inside or outside agency expertise, but de novo review was still rejected. The concern of Sears, and the business community at large, is that, absent review by this Court, valuable property will be disposed of through uninformed agency decisions subject to reversal only where a blatant abuse of discretion is shown.

Sears, as well as other businesses, are already under tremendous competitive pressure from foreign competition who have entered their markets. American businesses need more, not less, protection of their confidential business

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3 As the Petition poignantly states (Petition, p. 12 and n. 19), in the business context, the public's "right to know" under the FOIA is, in fact, becoming the competitor's right to surveil.

data from competitors. Government agencies, as exemplified by the OFCCP's action in the CNA case, have, with no expertise, blithely ignored the competitive harm that is likely to be engendered from public disclosure.

3. The relative scope of the Trade Secrets Act, 18 U.S.C. § 1905 and FOIA Exemption 4 is an important issue that has waited too long for resolution after Chrysler. The plain language of § 1905 makes it a crime for a federal employee to release the kind of commercially valuable information which, according to the court of appeals, should be handed over to anyone who writes a request letter to the OFCCP. If, as this Court implied in dictum in Chrysler (441 U.S. at 319 n. 49), the scope of Exemption 4 and § 1905 is the same, then there is no room for release of CNA's or Sears' or any business' confidential data under the FOIA. As CNA's petition underscores (Petition, pp. 12-14), the "substantial competitive harm" test of National Parks and Conservation Association v.

Morton ("National Parks I"), 498 F.2d 765 (D.C. Cir. 1974) does not adequately define the relative scope of Exemption 4 and § 1905, and is, in fact, inconsistent with Chrysler's indication that their scope is the same.

4. CNA's observation that "[t]he procedures applied by the OFCCP are of importance to every government contractor and subcontractor" (Petition, p. 14), is an understatement. The release of the information at issue in this case, in Sears' cases, and in cases involving other government contractors would be the taking away of valuable property without due process. CNA was not given any notice of the issues the OFCCP was to consider. CNA was denied access to the evidence upon which the OFCCP relied. If the decision below is permitted to stand, the same result awaits Sears and other employers. That result simply cannot be squared with the most fundamental due process requirements—notice of the issues and an opportunity to confront the evidence.

No one loses anything if the person whose property is at issue is told what factors the decisionmaker is going to consider. No one loses anything when the parties are permitted to see and respond to the evidence that the decisionmaker is going to review. On the contrary, everyone gains when these basic precepts of due process are accorded.

CONCLUSION

For the reasons stated herein, Sears urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1159

In the Supreme Court of the United States

OCTOBER TERM, 1987

CNA FINANCIAL CORPORATION, ET AL., PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were entitled to de novo review by the district court of their claim that the information at issue in this case is exempt from disclosure under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4), and protected from disclosure by the Trade Secrets Act, 18 U.S.C. 1905.

2. Whether the administrative procedures followed in reviewing petitioners' objections to disclosure were consistent with the requirements of the Due Process Clause and the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. IV) 701 *et seq.*

3. Whether the coverage of the Trade Secrets Act is co-extensive with the coverage of Exemption 4 of the FOIA.

4. Whether the Trade Secrets Act is a "withholding statute" within the terms of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1159

CNA FINANCIAL CORPORATION, ET AL., PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is reported at 830 F.2d 1132. The opinion of the district court (Pet. App. 130a-141a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 143a) was entered on September 29, 1987. A petition for rehearing was denied on December 1, 1987 (Pet. App. 144a). A petition for a writ of certiorari was filed on January 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are three affiliated insurance companies that do business with the federal government (Pet. App. 3a-4a). Like all other businesses receiving federal contracts

and thus covered by Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Comp.), petitioners annually submit affirmative action plans and "EEO-1" reports to an appropriate federal agency (Pet. App. 4a-5a). These affirmative action plans and EEO-1 reports set forth, among other things, the number, race, and sex of persons that petitioners employ in nine occupational categories (*id.* at 4a-5a & n.10).

In April 1977, petitioners were informed by the Insurance Compliance Staff (ICS) of the Department of Health, Education, and Welfare (HEW), the agency then charged with responsibility for monitoring petitioners' compliance with Executive Order No. 11,246,[1] that a group called Women Employed had filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552, that concerned information relating to petitioners (Pet. App. 6a). Specifically, Women Employed sought disclosure of two of petitioners' affirmative action plans, EEO-1 reports of petitioners, any reports prepared by the ICS in its assessment of petitioners' compliance with the Executive Order, and any agreements reached between petitioners and the ICS in light of such reports (*id.* at 6a, 72a-73a). Petitioners objected that some of the documents "contain[ed] confidential information which should not be released" (*id.* at 74a). The ICS responded that the objection was too general and that petitioners would have to provide more specific objections in order to

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[1] The responsibility for implementing Executive Order No. 11,246 was originally divided among various federal agencies and departments (Pet. App. 5a n.11). On October 1, 1978, the responsibility for monitoring compliance of government contractors was consolidated in the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (*ibid.*). This transfer of functions explains why the heads of OFCCP and the Department of Labor were named as defendants in this suit (*ibid.*).

prevent the information's release (*ibid.*). After petitioners failed to submit such objections, the ICS decided to release a substantial portion of the requested materials and notified petitioners of this decision (*id.* at 74a-75a).

Petitioners responded by filing an action in district court, praying that ICS be enjoined from releasing the information, and a petition for administrative review with the Office of Federal Contract Compliance Programs (OFCCP) (Pet. App. 6a-7a). In the district court action, the parties stipulated that the information would not be released until the administrative review procedures had been completed (*id.* at 7a & n.15). In the administrative proceeding, petitioners submitted detailed objections, including a five-volume index, concerning why disclosure would not be proper; petitioners principally complained that disclosure of the requested materials would subject them to adverse publicity and competitive harm (*id.* at 53a-54a). After reviewing these objections, the OFCCP reaffirmed the decision that the requested information should be released (*id.* at 75a-76a).

2. Petitioners sought judicial review of OFCCP's decision and prayed that the district court enjoin any disclosure pending adjudication of the matter (Pet. App. 54a). The district court refused to grant the requested interim relief, but the Court of Appeals for the District of Columbia Circuit reversed that judgment (*id.* at 54a-55a); it determined (*ibid.*) that the release of the information and all judicial proceedings should be stayed pending the issuance of this Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). After the *Chrysler Corp.* decision issued, the court of appeals further ordered that the case be remanded to the OFCCP "to make [a] new administrative determination[] in accordance with [its] normal rules of practice and in light of the [*Chrysler Corp.* decision]" (Pet. App. 70a).

On remand, petitioners requested that a hearing be held so that they could present evidence and examine the persons on whom the OFCCP would rely in making its decision (Pet. App. 79a). The OFCCP denied this request (*ibid.*). Instead, it provided petitioners with a list of the documents that it believed were relevant to their claim and invited them to provide new submissions for the agency to consider in passing on their objections (*id.* at 79a-80a). Petitioners did not respond to this invitation (*id.* at 80a). The OFCCP then reconsidered petitioners' objections and again determined that the requested information should be released, albeit with some editing to respect individual employees' privacy and to minimize any competitive utility of the information (*id.* at 7a & n.19, 72a-119a, 124a-129a). In making its decision, the OFCCP rejected (*id.* at 80a-82a) petitioners' argument that the Trade Secrets Act, 18 U.S.C. 1905,[2] is a nondisclosure statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3);[3] it noted that the argument was inconsistent with the legislative history of the FOIA and had been rejected by "[n]umerous federal courts" (Pet. App. 82a). Finally, the OFCCP held, contrary to petitioners' numerous argu-

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[2] The Trade Secrets Act, 18 U.S.C. 1905, criminalizes unauthorized disclosure of "information [which] concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any * * * [company] * * *."

[3] Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), exempts from mandatory disclosure material "specifically exempted from disclosure by statute, * * * provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

ments,[4] that disclosure would not "cause substantial harm to [petitioners'] competitive position" and, accordingly, was not within the scope of Exemption 4 of FOIA, 5 U.S.C. 552(b)(4) (Pet. App. 84a-94a).[5]

Petitioners filed suit in district court to challenge this decision (Pet. App. 56a). While their complaint was pending, petitioners discovered that the OFCCP had consulted an outside expert—Professor Boyd Fjelsted—to review

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[4] The OFCCP found petitioners' argument that the public, potential job applicants, and independent agents might misconstrue the import of its "applicant flow" data to be "purely speculative" and contrary to "common sense" (Pet. App. 86a, 88a). It found petitioners' suggestion that disclosure might cause termination of relations with the government confused, noting that "[t]hese figures already have been submitted to the Government," and that "[d]isclosure of the documents at issue to the public is irrelevant to the Government's determination of whether [petitioners'] Executive Order obligations have been met" (*id.* at 88a-89a). It found no support for petitioners' argument that release of the data "could aid a competitor * * * in directing its recruiting efforts" (*id.* at 89a), noting that the information about "[petitioners' recruitment] sources [is] extremely general, for example, 'walk-in,' 'newspaper ad,' 'employee referral,' 'agency,' " and adding that these "kinds of recruitment sources are surely no revelation to a competitor," and, in any event, that "[petitioner's] recruitment data is dated" (*id.* at 89a-90a). Finally, the OFCCP dismissed petitioners' claim that release of its staffing information would allow a competitor to divine petitioners' marketing and service strategy, finding that the data in question are "quite stale," that "much information about [petitioners'] profitability, compensation practices, and regional workforce staff size is already in the public record," and that "the most a rival could gain from the staffing information * * * is some vague, indefinite insight into the firms' priorities (as of 1975 and 1976) which would not be of significant competitive value" (*id.* at 92a-93a (footnote omitted)).

[5] Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), removes from the mandatory disclosure requirement "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

their submissions and to render an opinion on the substantiality of the competitive threat they described (*ibid.*). Petitioners demanded they be given an opportunity to review and respond to Professor Fjelsted's report (*id.* at 56a-57a). The district court, after conducting an in camera inspection, agreed with the OFCCP that the report constituted "deliberative materials" of an "agency decisionmaker" and, accordingly, that it was privileged and outside the scope of permissible discovery (*id.* at 57a). The court did remand the case to the OFCCP, however, for consideration of three affidavits that were inadvertently excluded from the agency record (*id.* at 122a-123a). But, on remand, the OFCCP denied petitioners' renewed request for an evidentiary hearing and again determined that disclosure was the proper course (*id.* at 58a).

3. On review, the district court determined that the OFCCP was entitled to summary judgment (Pet. App. 130a-141a). It rejected petitioners' argument that the agency's regulations required that a trial-type proceeding be followed in reviewing these disclosure objections (*id.* at 136a-137a); on the contrary, the court found that the regulations contemplate only "an informal 'paper hearing' on the company's objections" (*ibid.*). It also rejected petitioners' claim that they have a due process right to an oral hearing (*id.* at 138a-140a), finding that an oral hearing would contribute little to the accuracy and reliability of OFCCP's disclosure decisions and, concomitantly, that a trial-type procedure would involve substantial fiscal and administrative burdens. Finally, the court ruled that "the OFCCP's conclusion that the Trade Secrets Act[] is not an exempting statute under the third exemption of FOIA, but is coextensive with the fourth exemption, is amply supported by judicial precedent" (*id.* at 141a, citing *General Motors Corp.* v. *Marshall*, 654 F.2d 294 (4th Cir. 1981));

that "the agency's decision thoroughly discusses [petitioners'] objections and presents 'a reasoned and detailed basis for its decision' " (Pet. App. 141a (citation omitted)); and that "[petitioner] has provided, and the Court is aware of, no reason why this proceeding should be considered so extraordinary * * * to merit *de novo* review by this Court" (*ibid.*).

4. The court of appeals affirmed (Pet. App. 1a-68a). It agreed "with the District Court that 'the agency's decision * * * presents 'a reasoned and detailed basis for its decision,' " that "the agency's decision to release the documents found to be outside Exemption 4 must be upheld," and that "the procedures employed by OFCCP were legally sufficient" (*id.* at 67a-68a).

The court first rejected petitioners' argument that the Trade Secrets Act is a withholding statute within the terms of subsections (A) and (B) of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3)(A) and (B) (Pet. App. 10a-24a). As to subsection (A), the court stated that it "embraces only those statutes incorporating a congressional mandate of confidentiality that, however general, is 'absolute and without exception' " (*id.* at 12a (citations omitted)); and the court found that, under *Chrysler Corp.* v. *Brown, supra,* an agency retains discretion under the Trade Secrets Act to "adopt substantive regulations governing public access to its files" (Pet. App. 13a), discretion that is fatal to a subsection (A) claim (*id.* at 13a-14a). As to subsection (B) of Exemption 3, the court stated that it authorizes nondisclosure only where another statute establishes " 'particular criteria for withholding' " or refers to " 'particular types of matters to be withheld' " (*id.* at 14a (citation omitted)). The court then found that, as to the first prong of this test, "[t]he Trade Secrets Act is patently deficient * * *," because "nothing in the Act directs or guides an agency in deciding whether it ought to exercise its power to

authorize revelation of officially collected commercial and financial data" (*ibid.*), and that, as to the second prong of the test, the " 'oceanic' quality of the Act * * * 'undermines any notion that [the statute] represents a congressional determination of the advisability of secrecy for any "particular type[] of matter[]" ' " (*id.* at 16a-17a (citations omitted)).[6]

The court next addressed the question whether Exemption 4 of FOIA, when viewed together with the Trade Secrets Act, bars disclosure of the requested materials (Pet. App. 25a-53a). In answering this question, the court first considered the "position taken by some commentators, and urged here by agency counsel, that * * * the Trade Secrets Act is no broader than its three predecessor statutes were combined" and, accordingly, that the OFCCP has discretion to release materials that fall within the exemption but not within the Trade Secrets Act (*id.* at 25a-26a (footnote omitted)). After conducting an exhaustive analysis of the history of the Trade Secrets Act, the court concluded that "the scope of the Act is at least co-extensive with that of Exemption 4 of FOIA, and that, in the absence of a regulation effective to authorize

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[6] The court noted (Pet. App. 19a n.62) that its "holding that the Trade Secrets Act is not an Exemption 3 statute is consistent with the conclusions of several courts that have considered the question." It further noted (*ibid.*) that, while the Fourth Circuit reached a contrary conclusion in *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190 (1976), cert. denied, 431 U.S. 924 (1977), "[t]hat decision was premised * * * on the Supreme Court's ruling in *FAA* v. *Robertson*, [422 U.S. 255 (1975)]," and that, "[s]ince the 1976 amendments to FOIA have undermined that approach, several courts have regarded the *Westinghouse* holding as effectively overruled" (Pet. App. 19a n.62). Indeed, the court added, "[i]n a recent statement on the subject, the Fourth Circuit has implicitly suggested that it no longer regards the Trade Secrets Act as an Exemption 3 statute" (*ibid.*, citing *General Motors Corp.* v. *Marshall*, 654 F.2d 294 (4th Cir. 1981)).

disclosure, the Act prohibits OFCCP from releasing any information in [petitioners'] affirmative action programs and EEO-1 reports that falls within Exemption 4" (*id.* at 42a-43a (footnotes omitted)).

The court went on, however, to reject "[petitioners'] contention that OFCCP erred in its interpretation and application of the legal standard summoned by FOIA Exemption 4" (Pet. App. 43a). It noted that the OFCCP "explicitly stated the proper standard to be applied" (*id.* at 45a (footnote omitted))—whether disclosure " 'is likely to * * * cause substantial harm to the competitive position of the person from whom the information was obtained' " (*id.* at 44a, quoting *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974))—and "decline[d] [petitioners'] invitation to abandon th[at] * * * standard" (Pet. App. 45a n.146). On that view, the court confined its review "to the question whether OFCCP had correctly applied that standard to the facts of this case" (*id.* at 45a-46a), and found OFCCP's determination that disclosure would not cause substantial competitive harm to petitioners to be entirely rational (*id.* at 48a-53a).[7]

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[7] The court found that "much of the information sought by [petitioners] to be confined is already publicly available" (Pet. App. 48a). It also rejected petitioners' argument that disclosure was improper because it would cause adverse publicity, noting that "such complaints [are] unrelated to the policy behind Exemption 4 of protecting submitters from external injury" (*id.* at 49a). Finally, as to petitioners' arguments concerning the long-range consequences of releasing the data, the court found itself "presented [with] no more than two contradictory views of what likely would ensue upon release of [the contested] information * * *. [Petitioners'] objections were answered fully, and OFCCP's explanations of anticipated effects were certainly no less plausible than those advanced by [petitioners]" (*id.* at 50a-51a). The court thus concluded that the OFCCP's decision "cannot in any way be characterized as arbitrary, capricious, or an abuse of discretion" (*id.* at 51a).

The court similarly found no merit in petitioners' claim that they were entitled to additional procedures before the agency and the district court (Pet. App. 53a-67a). It agreed with the district court that the OFCCP's regulations "make[] no mention of an evidentiary hearing or indeed of any review procedures at all" (*id.* at 60a). It found that "[h]ardly more substantial is [petitioners'] claim that the agency factfinding procedures ran afoul of Section 10 of the Administrative Procedure Act and impinged on the full spectrum of review assured by the Due Process Clause" (*ibid.*); in this regard, it noted that it had previously rejected such a claim in *National Org. for Women* v. *Social Security Admin.*, 736 F.2d 727 (D.C. Cir. 1984) (*NOW*) (the APA and the Due Process Clause generally require no more than notice of the agency's decision and an opportunity to present relevant evidence to responsible agency officials), and ruled that "[t]he holding in *NOW* is dispositive on this issue" (Pet. App. 60a). The court then rejected petitioners' contention that they were entitled to receive a copy of Dr. Fjelsted's report (*id.* at 60a-66a), noting that, "[w]hen agency material is 'deliberative' or 'recommendatory' in character, and does not of itself inject new factual data into the calculus, the agency is privileged to withhold it" (*id.* at 62a-63a), and finding that this report "did not provide any new data" (*id.* at 63a) and "consist[ed] solely of analyses of data and recommendations of agency action predicated thereon" (*id.* at 64a).

Finally, the court rejected petitioners' claim that they were entitled to de novo review by the district court of the OFCCP's decision (Pet. App. 66a-67a). It noted that this Court's decisions in *Camp* v. *Pitts*, 411 U.S. 138 (1973) (per curiam), and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), "authorize de novo judicial review * * * only when the agency's factfinding proce-

dures are 'inadequate' " (Pet. App. 67a). It then found that the "decision in *NOW* upheld the procedures employed by OFCCP in reverse-FOIA actions—procedures which have largely been replicated here" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals; indeed, as petitioners concede (Pet. 7-8), the decision below represents the first appellate consideration of the questions left open by this Court in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), and numerous reverse-FOIA cases have been held in abeyance by other courts pending the resolution of this case. In such circumstances, review by this Court would be premature and inappropriate.

1. Petitioners first suggest (Pet. 9-11) that the courts of appeals are in conflict concerning whether de novo review is available in reverse-FOIA actions. This suggestion of a circuit conflict is, of course, inconsistent with petitioners' concession that the decision below is the first appellate consideration of the de novo review issue since the decision in *Chrysler Corp.* v. *Brown, supra*, was rendered. In any event, there is no conflict among the circuits. Based on this Court's decisions in *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam), and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414-415 (1971), the courts of appeals, including the court below, have uniformly held that de novo review is available in reverse-FOIA cases only where the agency's factfinding procedures are "inadequate." See, *e.g.*, Pet. App. 67a; *General Motors Corp.* v. *Marshall*, 654 F.2d 294, 298-300 (4th Cir. 1981); *Porter* v. *Califano*, 592 F.2d 770, 784 (5th Cir. 1979). Petitioners misread both the opinion below and the opinion in *NOW* when they suggest (Pet. 10-11)

that the Court of Appeals for the District of Columbia Circuit follows a "severely defective" procedures standard; in both cases, the court said that de novo review would be available only in cases where agency factfinding procedures are "inadequate." See Pet. App. 67a; *National Org. of Women* v. *Social Security Admin.*, 736 F.2d at 745.[8]

2. Petitioners further err in suggesting (Pet. 14-16) that the factfinding procedures used by the OFCCP in evaluating their objections to disclosure were inadequate. As the initial reviewing agency, the ICS notified petitioners of the request for disclosure and entertained petitioners' initial objections. The OFCCP then considered petitioners' appeal of the ICS's decision; in doing so, it allowed petitioners to make additional objections, to submit any evidence that they wished in support of their objections, and to review the evidence on which OFCCP intended to rely.[9] As a consequence, the OFFCP was able to

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[8] Petitioners' suggestion (Pet. 10) that the availability of de novo review should be "a function of the complexity of the factual issues presented" is irreconcilable with this Court's observation in *Chrysler Corp.* v. *Brown, supra*, that "*[d]e novo* review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of [the Trade Secrets Act]" (441 U.S. at 318). Exemption 4 determinations are necessarily fact-bound; thus, under petitioners' proposed standard, de novo review would be the rule rather than the exception.

[9] Petitioners err in suggesting (Pet. 14-15) that the OFCCP did not inform them of the issues involved in the case nor provide them with the evidence on which it ultimately based its decision. The OFCCP informed petitioners that, unless they presented valid objections, the information requested by Women Employed would be released; it thus informed them of the relevant issue—whether this information should be released—and "the onus was on [petitioners] to demonstrate that the materials should be exempt from FOIA's general requirement of disclosure" (Pet. App. 137a). Moreover, while OFCCP did not pro-

reach a reasoned decision in the case, in fact withheld some of the materials that petitioners did not want released, and provided a detailed explanation as to why it was releasing the rest of the materials in issue. While petitioners may be upset with the agency's final decision in this matter, the procedures they received were in no sense "inadequate." Indeed, the only additional procedure which petitioners could have received is an oral hearing, but "the absence of such a hearing does not render the procedures inadequate, for the procedures in *Camp v. Pitts* were found adequate without having provided such a hearing" (*National Org. of Women* v. *Social Security Admin.*, 736 F.2d at 746).

3. Petitioners also err in suggesting (Pet. 12-13) that the question whether the Trade Secrets Act and Exemption 4 of the FOIA have the same scope merits review by this Court. For one thing, the relative scope of the two provisions is not presented by the facts of this case. The OFCCP has determined that the material in issue falls outside of Exemption 4; the district court and the court of appeals have sustained that determination; and petitioners have not challenged the determination in this Court. Thus, the question whether the Trade Secrets Act bars disclosure of materials within Exemption 4 is not presented by the facts of the case. In any event, even if the issue were presented, it would not be petitioners' place to raise it for the Court's review. The court below held that, where information falls within Exemption 4, the OFCCP must withhold the information. Had the court held that the

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vide petitioners with a copy of Professor Fjelsted's report, that report was simply not "evidence" which petitioners were entitled to receive; it was not factual testimony, but rather "consist[ed] solely of analyses of data and recommendations" (*id.* at 64a), which are privileged.

Trade Secrets Act covers less information than does Exemption 4, the OFCCP would have discretion to disclose information falling within the exemption but outside of the Trade Secrets Act. Thus, it is the government, not petitioners, that would benefit from a reversal of the court's holding on this score.[10]

4. Finally, petitioners contend (Pet. 13-14) that the decision below conflicts with the decision in *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977), and that the Trade Secrets Act is in fact a withholding statute within the terms of Exemption 3 of the FOIA. But, as the court below explained (Pet. App. 19a n.62), the Fourth Circuit's decision in *Westinghouse* was predicated on this Court's decision in *FAA* v. *Robertson*, 422 U.S. 255 (1975), which was overruled by Congress in its 1976 amendments to Exemption 3. Since the enactment of the current version of Exemption 3, no other court has adopted the *Westinghouse* approach. See, *e.g.*, *General Elec. Co.* v. *United States Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1401-1402 (7th Cir. 1984); *General Dynamics Corp.* v. *Marshall*, 607 F.2d 234, 235-236 (8th Cir. 1979). Indeed, the Fourth Circuit has itself quoted with apparent approval the legislative history of the 1976 amendments that indicates that Exemption 3 does not encompass the Trade Secrets Act (*General Motors Corp.* v. *Marshall*, 654 F.2d at 297 n.9). Thus,

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[10] Petitioners suggest (Pet. 13) that the "substantial competitive harm" standard somehow "modifies the plain language of § 1905" and thus makes the relative scope of the two statutes an issue of concern to them. But the "plain language" of Section 1905 only penalizes disclosure "not authorized by law" (18 U.S.C. 1905). The "substantial competitive harm" test asks whether disclosure that is otherwise required by law is exempt; thus, while the absolute scope of the two statutes is affected by the "substantial competitive harm" standard, the relative scope of the two statutes is not affected.

petitioners' contention that a circuit conflict exists on this issue is unfounded and, as the thorough discussion by the court below reveals (Pet. App. 10a-24a), the Trade Secrets Act plainly does not satisfy the requirements of either subsection (A) or (B) of Exemption 3 of the FOIA.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1988

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[11] The conclusion that the Trade Secrets Act is not a withholding statute under Exemption 3 is fully consistent with our position in *United States Dep't of Justice* v. *Julian*, cert. granted, No. 86-1357 (June 15, 1987). In *Julian*, we noted that Fed. R. Crim. P. 32(c)(3), which provides for the withholding of presentence investigation reports, "speaks with uncommon particularity" (Gov't Br. 44). This narrow focus is in marked contrast to the " 'oceanic' quality of the [Trade Secrets] Act" (Pet. App. 16a-17a). The qualitative distinction between the issue presented in *Julian* and that presented by petitioners makes it unnecessary to hold the present petition pending the decision in *Julian*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CNA FINANCIAL CORPORATION,
CONTINENTAL ASSURANCE COMPANY,
and CONTINENTAL CASUALTY COMPANY,
Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and DIRECTOR OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1159

CNA FINANCIAL CORPORATION,
CONTINENTAL ASSURANCE COMPANY,
and CONTINENTAL CASUALTY COMPANY,
Petitioners,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF LABOR and DIRECTOR
OF THE OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS OF THE UNITED
STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari in this case. This brief is being submitted with the written consent of the parties, pursuant to Supreme Court Rule 36. The letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including individual employers as well as national trade and industry associations, which themselves have hundreds of employer members with a common interest in the foregoing purposes. The Council's governing body is a board of directors composed primarily of experts and specialists in labor relations and equal opportunity, whose combined experience gives the council a unique competence and understanding of the practical and legal aspects of pertinent government regulations. The members of the Council are committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of the Council's members, or their constituents, are employers and government contractors subject to the provisions of Presidential Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended. As such, they have a direct interest in the manner in which the government protects, or fails to protect, the confidentiality of the substantial volume of commercially-sensitive business information that is submitted to the government in connection with the Executive Order program. Thus, the members of the Council have a particular interest in the issues presented for the Court's consideration in this case.

The Council is particularly familiar with the issues and the long procedural history of the instant case, having participated as amicus curiae in the District of Columbia Circuit. In addition, because of its interest in issues pertaining to confidential business information, the Council has sought and has been granted permission

to participate as amicus curiae in numerous cases in this Court and in the courts of appeals. These cases have included *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), and several others which, similar to the instant case, involved no question of an employer's compliance with equal employment opportunity requirements, but rather raised issues concerning the public disclosure of confidential business information that was provided to a government agency.

STATEMENT OF THE CASE

This case has its origin in a Freedom of Information Act request filed with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The request sought the disclosure of copies of affirmative action programs prepared by Petitioner CNA Financial Corporation, a government contractor, and copies of CNA's federal EEO-1 reports showing all of the company's employees, categorized by race, sex, and occupational group. The requested information had been submitted to the OFCCP in accord with that agency's procedures for enforcing the nondiscrimination and affirmative action requirements applied to government contractors by Executive Order 11246.

Petitioner CNA opposed the disclosure of this information because of the competitive harm that would result. Specifically, CNA asserted that such disclosure would, among other things, reveal to competitors CNA's plans to enter, expand, or contract different markets and product lines, and would also facilitate competitors' attempts to raid CNA's employees, with a resulting increase in recruiting and training costs for CNA.

CNA's objections to disclosure were based upon Exemptions 3 and 4 of the Freedom of Information Act. CNA argued that the threat of substantial competitive harm meant that the requested material was within the protection provided by Exemption 4 which excludes from mandatory disclosure "trade secrets and commercial or

financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b) (4) (1982). In addition, CNA argued that the requested information was covered by the prohibition on disclosure found in Section 1905 of the Trade Secrets Act, and that the Trade Secrets Act is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. § 522(b) (3) (1982).

CNA requested that it be granted a hearing on this matter before the agency, but the agency refused and the final decision was made without the benefit of a hearing on CNA's objections to disclosure. In attempting to resolve the question of competitive harm, OFCCP consulted an outside expert to advise the agency on whether such harm could result from disclosure. The agency rejected CNA's opposition to disclosure and ordered release of the data. CNA then sought relief in federal district court, which sustained the agency's determination without affording CNA a hearing in which to cross-examine the agency's expert or attempt to rebut the report on which the agency had based its critical finding that release of the data would not result in competitive harm to CNA.

On appeal, the District of Columbia Circuit denied CNA's arguments that the agency proceedings had been flawed by the agency's refusal to provide a copy of the outside expert's report to CNA. The Court of Appeals also ruled that CNA was not entitled to have de novo review of the competitive harm issue in federal court, and indicated that absent a showing that there was a serious inadequacy in the agency's factfinding procedures, the court's review would be limited to a review of the agency record. The Court of Appeals thus upheld the agency's decision to release the information.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents serious questions about the basic fairness of procedures which allow a contractor's confidential business information to be disclosed by the Department of Labor—over the objections of the contractor—without the benefit of a hearing either before the agency or in federal court to resolve material, disputed issues of fact. The decision of the Court of Appeals, by endorsing such a procedure, contradicts established principles of procedural fairness and therefore is appropriate for review by this Court.

In addition to the procedural due process issues raised by the cumulative impact of the denial of a hearing in either the administrative or judicial phases of this matter, the case presents for review a series of important unresolved issues related to so-called "reverse FOIA" litigation in which a government contractor seeks to protect the confidentiality of sensitive business information which has been submitted to the government. These issues include questions about the relationship of Section 1905 of the Trade Secrets Act and Exemptions 3 and 4 of the Freedom of Information Act and the question of when de novo review of an agency's decision to disclose confidential business information is appropriate.

There has been general uncertainty about these issues since they were left unanswered by this Court's decision in *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979). The ruling by the Court of Appeals in this case demonstrates that the lower courts have been unable to produce consistent, practical answers to these questions, and thus review by this Court is essential to provide guidance on these issues.

REASONS FOR GRANTING THE WRIT

I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE LOWER COURT'S DECISION ENDORSES A PROCEDURE WHICH OFFENDS BASIC NOTIONS OF FAIRNESS BY ALLOWING DISCLOSURE OF PETITIONERS' CONFIDENTIAL BUSINESS INFORMATION OVER THE OBJECTIONS OF THE PETITIONERS WITHOUT GIVING PETITIONERS ANY OPPORTUNITY FOR A HEARING, EITHER BEFORE THE AGENCY OR IN THE DISTRICT COURT.

This action involves a Freedom of Information Act request filed with the Department of Labor seeking disclosure of certain information which the Petitioners (CNA) had submitted to that agency. Petitioners objected to such disclosure and advised the agency that the information at issue is considered by Petitioners to be sensitive and confidential business information which could cause the Petitioners significant competitive harm if disclosed. The agency decided to disclose the information over the Petitioners' objections.

Given the nature of Petitioners' objections, it is remarkable that the agency made its decision without ever having given Petitioners an opportunity for a hearing, especially since the Petitioners' claim of competitive harm clearly raised material issues of fact, as evidenced by the agency's resort to an outside expert to help it resolve that claim. This flaw was compounded by the district court when it refused to conduct an evidentiary hearing and made its decision to support the agency simply on the basis of the agency's record. Thus, the Petitioners now face the prospect of having confidential business data disclosed to the public, including business competitors, without ever having been given the benefit of an evidentiary hearing.

This concern, that the overall procedure lacked any opportunity for a hearing, is a very serious one for government contractors generally. They are required to submit

significant amounts of business data to the Department of Labor, which enforces the nondiscrimination and affirmative action requirements of Executive Order 11246. Quite apart from its usefulness to monitor issues of equal opportunity related to the contractor's workforce, this data can provide competitors with a great deal of insight as to the confidential business plans of a company.

In assessing a contractor's objections to disclosure based on the potential of competitive harm, the agency is asked to make complex and very sophisticated judgments about issues in which it has no expertise. This factor makes litigation such as the instant case fundamentally different from many other types of administrative proceedings in which an agency is acting in an area where it has special technical knowledge. This distinction, combined with the importance of the interest a contractor has in maintaining the confidentiality of competitively-sensitive information, underscores the conclusion that basic notions of fairness require that the contractor be given an opportunity for a hearing at some point in the process.[1]

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[1] It is important at the outset to understand the nature of the information and data which is the subject of this lawsuit. Unlike a manufacturer's "secret formula", the importance of which is evident to even an uninformed observer, the necessary confidentiality of the vast amounts of data collected by OFCCP often requires special explanation to someone unfamiliar with the business operations involved. This same information, however, can be quite relevant to market and financial specialists and technicians who understand the industry. As noted by the Court of Appeals for the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1213 n.74 (1976), firms in highly competitive industries frequently employ specialists who continually search out fragments of information about competitors in this country and their operations. The court continued, quoting from an article printed at 9 Akron L. Rev. 673, 683-684 (1976):

> An additional reliable 'fragment' of information may be enough to bring the whole picture into much clearer focus and could conceivably mean the difference between success or failure in

As the discussion below indicates, there are sound reasons to conclude that the proceedings in this case at the Department of Labor were flawed and to suggest that de novo review by the district court was required in this case, particularly because disclosure hinged on a finding of fact that CNA vigorously disputed. But, the critical point is that unless the overall process contains *some* opportunity for an evidentiary hearing, disclosure of a contractor's confidential business information over the contractor's objections falls short of the basic fairness due in such a proceeding.

A. The Procedures Followed by the Department of Labor in this Matter Were Marked by Serious Inadequacies.

The Court of Appeals' opinion in this case by Judge Robinson, endorsing as adequate the procedures followed by the Department of Labor, stands in sharp contrast to Judge Robinson's earlier opinion criticizing precisely the same procedures by the same agency in *National Organization for Women (NOW) v. Social Security Administration*, 736 F.2d 727 (D.C. Cir. 1984). In his opinion in *NOW*, Judge Robinson pointed out that current case law provides "little guidance for determinations on whether agency factfinding procedures are adequate within the meaning of Section 10 of the APA, as interpreted by the Supreme Court." 736 F.2d at 738. Judge Robinson went on to offer a series of factors to be used in rationally analyzing the adequacy of agency procedures.

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certain contract bidding situations. The importance of a court's decision on disclosure in any given case is magnified by the fact that a number of jobs and possibly the future of the business may hinge on obtaining a given contract, depending on the industry involved and a number of other factors.

As discussed in note 5, *infra*, the data collected by OFCCP can be used by a competitor to determine significant information about a company's labor costs and profit margins.

First, he noted the fundamental precept that "interested parties must have an effective chance to respond to crucial facts." [2] He observed that this proposition is reflected in this Court's statement in *Greene v. McElroy*, 360 U.S. 474, 496 (1959), that

> where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

In addition, Judge Robinson cited this Court's statement in *Bowman Transp. v. Arkansas-Best Freight Systems*, 419 U.S. 281, 288 (1974), that a "party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." [3] Finally, Judge Robinson noted that the Department of Labor's procedures:

> confined the companies, in their efforts to establish just such a threat [of substantial competitive harm], to written specifications of reasons for confidential treatment. The companies put forward lengthy and detailed written statements in support of their position, only to learn in the end that overwhelmingly their efforts were unsuccessful. *Neither the agency's regulations nor its procedures offered the companies any guidance in focusing their presentations or documentation and, for much of the material implicated, the companies became aware of the agency's objections to their claims only after the agency's final decision to disclose.*

NOW, 736 F.2d at 740-741. (Emphasis added).

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[2] *National Organization for Women (NOW) v. Social Security Administration*, 736 F.2d at 727 (D.C. Cir. 1984), quoting *Carson Products Co. v. Califano*, 594 F.2d 453, 459 (5th Cir. 1979).

[3] *See NOW*, 736 F.2d at 739.

The logic and law behind Judge Robinson's carefully drafted criticism of these procedures is none the less valid because he adopted a different approach in the instant case without referring to his earlier-stated concerns. Rather, a comparison of the two opinions merely highlights how far the court below has drifted from the rulings of this Court in analyzing the adequacy of agency procedures.

The contradictions between the decision below and the rulings of this Court which Judge Robinson summarized in *NOW* indicate the importance of Supreme Court review in this case. By granting certiorari in the instant case, this Court would have an opportunity to offer much-needed guidance for such determinations.

B. The District of Columbia Circuit's Inappropriate Denial of De Novo Review in the Instant Case Demonstrates the Confused and Inconsistent State of the Law.

Notwithstanding the lack of an evidentiary hearing and the agency's refusal to reveal its secret expert's report, the Court of Appeals below ruled that de novo review in federal court was inappropriate. The Court of Appeals reached this conclusion by applying a standard which would permit de novo review only when the agency's own procedures were inadequate. In support, the court cited its own analysis in the concurring opinion in *NOW* wherein it interpreted rulings of this Court to mean that "procedures must be severely defective before a court proceeding under the APA can substitute de novo review for review of the agency's record." 736 F.2d at 745. The court of appeals suggested that substantial bias on the part of the agency would be such a severe defect.

There are several serious deficiencies in this analysis by the Court of Appeals. First, as pointed out above, the agency procedures in this case fall short of several commonly-accepted propositions of basic administrative

fairness, and thus were not adequate. Second, the District of Columbia Circuit's interpretation of the law as requiring that there can be de novo review only when there is a severe defect is not an accurate reading of this Court's decisions. Third, the District of Columbia Circuit's approach on this issue is inconsistent with the approach of the Fourth Circuit, which, in *General Motors Corp. v. Marshall*, 654 F.2d 294, 298-99 (1981), suggested that availability of de novo review depends on the complexity of the factual issues involved. The amicus believes that the view of the Fourth Circuit more accurately represents the sense of this Court's language in *Chrysler* on this issue. In any event, however, the conflicts between the two circuit courts indicates that this question is appropriate for review by this Court.[4]

It should be noted that the Circuit court decision in the instant case, as well as the concurring opinion in *NOW*, fail to appreciate the nature of the issue before the agency in a case involving the potential disclosure of confidential and sensitive business information. In such a case, the agency is being called upon to make judgments on matters in which it has no particular expertise. The primary issue involves how the information can be used by competitors and the ultimate competitive harm that can result from the disclosure. The agency making that judgment in this case is an agency with special expertise in issues of employment discrimination. Indeed, that was the purpose for which the information in question was provided to the agency. But, the issue

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[4] In seeking to adopt a new standard which would be consistent with *Chrysler*, the District of Columbia Circuit articulated a standard for de novo review which, in practical terms, can virtually never be met. That is, the concurring opinion in *NOW* contemplates that de novo review would be appropriate apparently only in the most extreme circumstances, such as where there is evidence of substantial bias in the agency procedures. See 736 F.2d at 745. Such a standard is not reasonable in reverse-FOIA cases, nor is such a standard an accurate reading of this Court's decision in *Chrysler*.

of potential harm resulting from disclosure is an issue entirely unrelated to employment discrimination.[5]

II. REVIEW IN THIS CASE WOULD PROVIDE A MUCH-NEEDED OPPORTUNITY FOR THIS COURT TO RESOLVE OTHER SERIOUS QUESTIONS LEFT UNANSWERED IN *CHRYSLER CORP. v. BROWN*.

In *Chrysler*, this Court left unresolved the relationship between § 1905 of the Trade Secrets Act and the Freedom of Information Act. In *Chrysler*, the Court specifically noted that it would "not here attempt to determine the relative ambits of Exemption 4 and § 1905, or to determine whether § 1905 is an exempting statute within the terms of the amended Exemption 3, ..." 441 U.S. 319 n.49. Both of these questions arise with frequency in reverse-FOIA litigation prompted by third party requests for the government to disclose confidential business information. The circuits have not been able to

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[5] The same information which allows the federal government to assess the equal opportunity profile of an employer's workforce reveals very different things to observers with different interests and backgrounds. For example, even the basic workforce analysis, which is but one part of the information collected by the OFCCP, can be used by a competitor to determine a company's labor costs and profit margins.

By using the data concerning the size and character of the company's workforce in conjunction with Bureau of Labor Statistics compilations of average labor rates for different job classifications in each locality, it is possible to calculate a company's expenditure on salaries within particular production facilities. Derivatively, such information also reveals the types and amount of expenditures which have been made on labor-saving machinery. By taking all of this information and combining it with the costs of materials, which are fairly standard throughout an industry, a company's cost structure and profit margin can be determined. In addition, future labor commitments can be determined from this data by studying where the on-the-job trainees have been concentrated over a period of years.

arrive at a consistent answer,[6] and thus this question, too, is one which the Court should now address.

III. REVIEW BY THIS COURT IS NECESSARY TO CLARIFY THE INTERPRETATION OF EXEMPTION 4 OF THE FREEDOM OF INFORMATION ACT.

The Court of Appeals affirmed the agency's conclusion that the information at issue is not protected from disclosure by Exemption 4 of the Freedom of Information Act. At the same time, however, the court acknowledged that the standard applied by the agency has been the subject of much criticism. An anlysis of the language of Exemption 4 and its legislative history suggests that this criticism is well-founded, and that this issue also warrants review by this Court.

Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4),[7] represents a straightforward Congressional judgment that the disclosure mandate of the FOIA should not apply to confidential business information which has been obtained by the government but which customarily would not be released to the

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[6] The relative scope of Section 1905 and Exemption 4 has been found to be the same in the Fourth Circuit, *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1204 n.38 (1976) and *General Motors Corp. v. Marshall*, 654 F.2d 294, 297 (1981). On the other hand, the Seventh Circuit has suggested that Section 1905 protects less information than Exemption 4, *General Electric Co. v. United States Nuclear Regulatory Commission*, 750 F.2d 1394, 1402 (1984), while this Court in *Chrysler* raised the theoretical possibility that Section 1905 covers information not protected by Exemption 4. See 441 U.S. at 319 n.49.

[7] Exemption 4 of the Freedom of Information Act provides that the disclosure requirements of the Act do not apply to matters that are:

> trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .

5 U.S.C. § 552(b)(4).

public by the person from who it was obtained. This intention was expressed specifically in both the Senate Report and the House Report accompanying the Freedom of Information Act:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from who it was obtained.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). Indeed, the companion language in the House Report was quoted by this Court in *Chrysler Corp. v. Brown*, 441 U.S. 281, 291 n.11 (1979):

> [Exemption 4] exempts such material if it would not customarily be made public by the person from who it was obtained by the Government.

H.R. Rep. No. 1497, 89th Cong. 2d Sess. 10 (1966), U.S. Cong. & Admin. News 1966, p. 2427.

Against this background of legislative intent, any objective assessment of the information at issue in this case must yield the conclusion that that information, in fact, is confidential and that it is entitled to the protection of Exemption 4. The information was not customarily made public by the business organization which provided the information. But the agency, and subsequently the court, ignored entirely the "not customarily made public" standard of the legislative history and relied instead on the test fashioned in *National Parks and Conservation Association v. Morton*, (*National Parks I*) 498 F.2d 765 (D.C. Cir. 1974). This test finds no basis in the legislative history.

The *National Parks* test emerged in an opinion in which the Court of Appeals for the District of Columbia Circuit announced that the "not customarily made public" test was not the only relevant inquiry in determining whether information is confidential for purposes of

Exemption 4. 498 F.2d at 767.[8] The court discussed various aspects of the legislative history of the FOIA and demonstrated strong support for the proposition that the legislative purpose underlying the exemption for commercial information is to *encourage* cooperation by those who are not obliged to provide information to the government and to *protect* the rights of those who must supply such information. The court concluded:

> This history firmly supports the inference that Section 552(b)(4) is intended for the benefit of persons who supply information as well as the agencies which gather it.

498 F.2d at 770. The court then adorned its discussion with a summary of a simplified test to be used to determine confidentiality under Exemption 4:

> To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from who the information was obtained.

498 F.2d at 770 (footnote omitted). Curiously, the *National Parks* opinion is most often remembered for this shorthand test for confidentiality and not for its conclusion that the purpose of the fourth exemption is to encourage and protect the submitters of data. The opinion does not attempt to explain why this shorthand test follows logically from the legislative desire to encourage and protect submitters of information. Nor does the

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[8] Prior to *National Parks I*, the District of Columbia Circuit had repeatedly applied Exemption 4 to protect from disclosure information that customarily would not be made public by the person from whom it was obtained. See *Sterling Rug, Inc. v. FTC*, 450 F.2d 698, 709 (1971); *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F.2d 578, 582 (1970).

opinion attempt to explain why this shorthand formula is more appropriate than the legislative formula ("not customarily made public") as a test that will achieve the legislative purpose to encourage and protect submitters. Indeed, the *National Parks I* opinion begins its analysis by emphasizing that an *objective* test is called for under Exemption 4, but concludes with a shorthand test which effectively requires a court to make highly *subjective* determinations about potential impairment of an agency's ability to gather information and the potential likelihood of substantial competitive harm if information is not protected.

There is nothing in the legislative history to suggest that Congress intended to impose such subjective determination on courts and agencies faced with Exemption 4 issues. Indeed, the complexity and duration of reverse-FOIA litigation such as the instant case is a result of the difficult issues produced by such a subjective test. Such proceedings could be simplified considerably—with a consequent savings in court, agency and contractor resources—if the test expressly dictated by Congress were to be applied; that is, Exemption 4 should protect information which customarily is not made public by the individual who supplied it to the government. This case provides the Court with an appropriate opportunity to clarify the application of Exemption 4.

CONCLUSION

For the reasons set forth, the Amicus Curiae Equal Employment Advisory Council supports the Petition and urges the Court to grant certiorari in this case.

Respectfully submitted,

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